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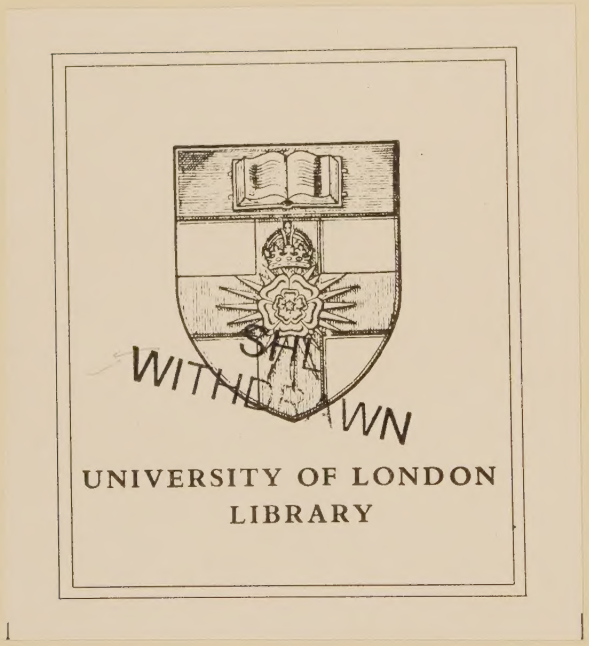

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CURRENT LEGAL PROBLEMS 1949

VOLUME 2

CURRENT LEGAL PROBLEMS

1949

EDITED BY

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AND

GEORG SCHWARZENBERGER

On behalf of
THE FACULTY OF LAWS, UNIVERSITY COLLEGE, LONDON

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CONTENTS

Preface *page* vii

Obituary ix

1. THE FINAL COURT OF APPEAL 1
   By The Right Hon. Lord du Parcq, p.c., k.c., m.a., d.c.l.

2. ENGLISH PROCEDURE AND PRACTICE, MORE PARTICULARLY IN CRIMINAL MATTERS 13
   By The Right Hon. Lord Porter, ll.d.
   Lord of Appeal in Ordinary

3. THE REFORM OF THE LAW OF MURDER 27
   By Professor S. G. Vesey-FitzGerald, m.a., ll.d.
   Dean of the Faculty of Laws, University of London, and Professor of Oriental Laws in the University of London

4. *MENS REA* AND BIGAMY 47
   By J. L. J. Edwards, b.a.
   Lecturer in Laws, University College, London

5. THE PROBLEM OF FINDING 68
   By O. R. Marshall, m.a., ph.d.
   Sub-Dean of the Faculty of Laws, University College, London and Lecturer in Laws, University College, London

6. THE CHARITY MUDDLE 86
   By Professor G. W. Keeton, m.a., ll.d.
   Professor of English Law in the University of London and Dean of the Faculty of Laws, University College, London

7. THE THREE TYPES OF LAW 103
   By G. Schwarzenberger, ph.d., dr.jur.
   Reader in International Law in the University of London and Vice-Dean of the Faculty of Laws, University College, London

8. THE PHILOSOPHY OF THE COMMON LAW 116
   By R. O'Sullivan, k.c.
   Honorary Lecturer in Laws, University College, London

9. SOME ENGLISH CIVILIANS 139
   By Professor H. F. Jolowicz, m.a., ll.d.
   Regius Professor of Civil Law in the University of Oxford

10. CODIFYING ENGLISH LAW 155
By D. Lloyd, M.A., LL.B.
Reader in English Law in the University of London

11. THE CONSTITUTIONAL ASPECT OF THE PUBLIC CORPORATION 172
By Professor E. C. S. Wade, M.A., LL.D.
Downing Professor of the Laws of England, University of Cambridge

12. THE RIGHT OF PUBLIC MEETING 183
By E. R. H. Ivamy, LL.B.
Assistant Lecturer in Laws, University College, London

13. THE TWILIGHT OF DOMINION STATUS? 202
By R. C. FitzGerald, LL.B., F.R.S.A.
Reader in English Law in the University of London

14. PRIVATE LAW ASPECTS OF WESTERN UNION 226
By Professor F. H. Lawson, D.C.L.
Professor of Comparative Law in the University of Oxford

15. LAW IN THE BRITISH ZONE OF GERMANY 245
By Professor H. Krawinkel, DR.JUR.
Vice-Dean of the Faculty of Laws, University of Cologne

16. MEMBERSHIP IN THE UNITED NATIONS 258
By L. C. Green, LL.B.
Lecturer in Laws, University College, London

Table of Cases 283

Table of Statutes 285

Index 287

PREFACE

THIS Volume contains the weekly public lectures on Current Legal Problems delivered in the Faculty of Laws at University College, London, during the Session 1948–1949 and Lord du Parcq's Presidential Address at the Inaugural Dinner of the Bentham Club.

It may be appropriate to say here a few words on the Bentham Club. It is the newly founded society of graduates of the Faculty of Laws of University College, London, and its primary function is to maintain contact between the Faculty and its former students and between the graduates themselves. When, therefore, the Faculty was requested by the Committee of the Bentham Club to consent to *Current Legal Problems* becoming the organ of the Club, the Faculty gladly acceded to this request; for, as it had been put in the Preface to the First Volume, it is one of the purposes of this publication 'to keep former students in the Faculty in close touch both with the College and with recent developments in the legal field'.

The Bentham Club had been fortunate in securing that very eminent and distinguished lawyer, The Right Hon. Lord du Parcq, as its first President, and it would have been impossible for the Club to have had a more auspicious start. But the Club has suffered, as has, indeed, the legal world, a grievous loss through the death of Lord du Parcq. The Chairman of the Bentham Club pays a tribute to Lord du Parcq in the obituary notice on p. ix of this volume.

We should like to thank Dr. Marshall, the Assistant Editor of this volume of *Current Legal Problems,* for having shouldered the burden of proof reading and for having compiled the Tables of Cases and Statutes as well as the Index.

THE EDITORS

University College, London,
April, 1949

LORD DU PARCQ

1880–1949

THOSE members of the Bentham Club who had the privilege of hearing Lord du Parcq's presidential address at University College on February 23, 1949, read with a profound shock of his sudden death on April 27, 1949. His mental vigour—he had no need of manuscript—his keen wit, his happy, friendly, unassuming diction on that occasion, coupled with a countenance of almost youthful hue, suggested a man in the prime of life, eager for tasks ahead.

The judiciary lost a valued member and the nation a servant whose wisdom, a judicious mingling of law, common sense and humanity, would have proved invaluable in years to come in framing reforms required by modern thought and developments. Lord Porter said that the people at large felt that here was one who appreciated their problems and was anxious that justice as they understood it should be done, while the Lord Chancellor suggested that Lord du Parcq helped to dispel for ever the foolish notion that a fine lawyer is a pedant who contributes little to human progress. Others have written fully elsewhere of his distinguished career from barrister to Lord of Appeal and of his excellence as a judge. The unprecedented action of the Lord Mayor in publicly welcoming him on his first appearance as a justice at the Central Criminal Court bears witness to his personality.

It was typical of Lord du Parcq that he should have accepted the presidency of the Bentham Club in its first year. With characteristic modesty and good will he found time in a crowded life to stimulate a little group of lawyers who were anxious to broaden their experiences. His address provided just one more illustration of his wide approach to innovations, even constitutional, and of his full appreciation of their practical value. The Bentham Club is honoured to present his words.

PETER E. JONES,
Chairman, Bentham Club

I

THE FINAL COURT OF APPEAL

The Rt. Hon. Lord du Parcq

I was a little alarmed when the Secretary said that I was expected to deliver an address, but I am glad to find this evening that it is announced as a talk.

This is the Bentham Club, and I asked the Secretary whether becoming President involved an acceptance of all the views of Jeremy Bentham. I was assured that it is not the main object of the Club to press all those opinions on the country or on the world.

I am bound to say that, although it may have been my imagination, I thought that there was a slightly suspicious look in the eye of Jeremy when I arrived this evening. I am not sure that he would have entirely approved of me, and I am not certain that I entirely approve of everything that he said, but I am perfectly sure that you were right in naming your Club after him. He was a very great man, and we owe much to him. At any rate, he prevented lawyers, and he still prevents lawyers if they think about him, from being too complacent about our system of law. I think that perhaps it is a fault to which we are a little prone.

I thought that if I was going to give you a talk tonight I might say some of the ordinary things about our great legal system, for which I have the greatest admiration, but then I thought, I am bound to say, of Jeremy Bentham. I thought particularly of one remark that I came across, with which I find that the Scottish lawyers are well acquainted, when he said, I suppose by way of a compliment, to our friends the Scots: 'There is one merit which in comparison with English is peculiar to Scotch lawyers. They do not plaster over the foulness of their system with eulogistic daubings'. That warned me off that kind of speech-making.

I thought that perhaps I would speak about the various changes that I have seen in my time at the Bar and on the Bench,

and I think that he would have approved of some of them. He would, I think, certainly have approved of the greater simplicity of our pleadings. He would have been glad that we did not have separate Courts of Equity granting injunctions against the exercise of common law rights, and he would, I think, have approved more than I do of the extent to which cases are now tried by judges without juries. I think that he would have approved of all those things, but I came to the conclusion that whatever Jeremy Bentham might say, and however little he might like the subject, on an occasion like this it would perhaps be just as well that I should deal with something with which I have been rather closely in touch now for a little while. As there have been some recent developments, and as there are one or two topics to which perhaps I can add something which is not very commonly known, I decided—I hope that you will not mind—to say something about the House of Lords in its judicial capacity.

I am no historian, and I know quite well that there are people here who know a great deal more about this than I do, but if you think of it, the way in which the jurisdiction of the House of Lords has developed is typically English. There are points in its history where it is amazing to think that any country could have put up with it at all, and then when one sees its gradual development and the form in which it has come down to our own days one sees how the genius of the people of this country has asserted itself. By taking something which is traditional and historical and making use of it they have made it into quite a good practical working thing, at the same time clinging to all the old traditions as tenaciously as they can.

One can understand that in the early days when much of the education and learning of the country was to be found amongst the peers and prelates it was not unnatural that they should be thought to be suitable people to hear appeals. It is said, and I think truly said, that the House of Lords is the oldest court in the world. As has been said, it is even older than the Vatican. In the reign of Edward III one prelate, two earls and two barons were entrusted with the King's Commission to hear complaints of delays and grievances in the Courts of King's Bench, Common Pleas and Exchequer, and in the reign of Queen Elizabeth there was a right of appeal to Parliament from decisions of the Exchequer Chamber, but gradually it came to

be realised that questions such as had to be decided on appeal from the Law Courts called for professional advice, and that even prelates and earls might not be very competent to deal with them. Nevertheless, when one comes down to the great days of Lord Eldon the state of affairs was remarkable. The quorum of the House of Lords is three, and as far as I know it always has been three. When the House of Lords sits to hear appeals from the Court of Appeal or the Courts in Scotland or Northern Ireland, it is the House of Lords that is sitting. (I am speaking of the position as it was when I first became, not so long ago, a Member of that House.) It is not possible for the House of Lords to sit in two places at once. If it is sitting in a legislative capacity, it cannot be sitting in a judicial capacity, but in whatever capacity it is sitting, it is the House of Lords. The Mace is brought in. If the Lord Chancellor is there he presides on the Woolsack. If he is not, some other peer 'sits Speaker'. The proceedings are opened by prayers led by the bishop. If necessary, if the House is not to be resumed until the next day, someone has to move the adjournment, and so on. It is precisely a sitting of the House, and nothing else.

By Lord Eldon's day it was fully realised that you had to secure the representation of professional opinion. Lord Eldon was a great lawyer. Jeremy Bentham did not entirely approve of him, but no doubt he was a great lawyer. In those days the Lord Chancellor would hear and decide cases, not only in the House of Lords, but in the Court of Chancery. Then there would come an appeal to the House of Lords. When the litigants arrived in the House of Lords to plead their case on the appeal from Lord Eldon—the decision of Lord Eldon had probably been given two or three years before—what did they find? They found on the Woolsack Lord Eldon, but with regard to the peers on the benches of the House let me quote what Lord Westbury said: 'The officers of the House were sometimes obliged to catch a bishop and invite him to act as dummy. A lay peer was sometimes pressed into service and the Lord Chancellor, gravely assisted by these two mutes, administered justice in a final manner'. Great lawyer that he was, Lord Eldon was ready to change his mind and to say sometimes that he was convinced that he had been wrong, but it does seem to me almost incredible that any country in the world could put up with that system.

We can, I think, say of our country that we are very ready to think that what is is right and just and sound, and I daresay that the arrangement worked very well, although at great expense, and I am sure that Lord Eldon laid down some very sound principles, but there it was.

It was only in 1844, in the case of *O'Connell,*[1] that it was definitely laid down—although I do not think that it had the force of law—that only Lords learned in the law should vote. That was then said, and that was established at any rate as a convention. Recently I looked at the Journals of the House of Lords. I looked particularly at the Journals for 1825, and I found that (I suppose in order to end the unfortunate necessity of sending an attendant round the House to try to collect a stray bishop or a lay peer who was reposing in the library and who was prepared to come and take an intelligent interest in the proceedings in the House) a rota system had been established. Certainly in 1825, and I think for a considerable time afterwards, the procedure was that there was a solemn ballot held. All peers who were over 70 were excused. I am not talking of professional lawyers now, but of the peers who were not lawyers, including peers of every degree. Illness was, of course, an excuse, and it was recorded of one of the dukes that His Grace was excused owing to an attack of the gout. Those who were absent from the country on some important matter were also excused, but subject to these exceptions the names of all peers were in the ballot, and for every day in the year, except days when the House would not sit, such as Good Friday, three names were drawn. It seems that the names of all eligible peers were put into a glass bowl. This was turned round in some way, by the clerks at the table, and the first three names that came out of the bowl were put down for the particular day, and so on. Thus a rota was formed, so that you were always sure of your quorum. This was specifically for appeals, so that the admirable system was then in force that you had perhaps one or perhaps two professional lawyers, and there were always three laymen from whom you could draw others, or one other, to make up the quorum.

There was a very interesting note over the initials 'R.E.M.', which are not unfamiliar to some of you, in the last number of

[1] *O'Connell* v. *The Queen* (1844), 5 St. Tr. (N.S.) 1.

the *Law Quarterly Review*.[2] The author quoted what the Earl Spencer of that day said before a Royal Commission some years ago. He said that as a young man he had sometimes been called in to make a quorum and sit during the hearing of an appeal. The note calculated that this must have been in about 1860. It referred to the incident in 1883, about which I want to say a word presently, when Lord Denman, the son of the Lord Chief Justice, distinguished himself. Earl Spencer said: 'There is some authority for the view that as recently as 1860 and 1883 lay peers have taken part in hearing appeals to the House of Lords, at the former date with the concurrence of the Law Lords, and at the latter date without it'.

I think that one can come down a good deal later than 1860, and I think I am right in saying that right down to the time when there were Law Lords in the strict sense, and certainly down to the time when it was decided, although it was an abortive decision, that Baron Parke should be made a life peer, lay peers from time to time sat. An attentive study of the Law Reports will, I think, show this to be true.

I will take one very well-known case which was decided in 1868, namely the case of *Rylands* v. *Fletcher*.[3] If you look at the report of that case you will observe, as I daresay you have already, that the elaborate speeches which were delivered which are addressed in the usual way: 'My lords', 'Your Lordships' House', and so on, were delivered by only two Members of the House, namely, Lord Cairns and Lord Cranworth. I have been unable to discover who the third peer was who must have been there, but it is, I think, clear that he was not a lawyer, and that *Rylands* v. *Fletcher,* which is a case of some importance in the history of our law, was the decision of two learned Lords, namely, the Lord Chancellor and Lord Cranworth, and only two.

That went on, but it did begin to dawn on people that the system was perhaps not entirely perfect. Then, as I say, we get to the point when it was proposed that Baron Parke should be made a peer for life. It was decided by the House that this was impossible,[4] and, as you know, he became a hereditary peer as Lord Wensleydale.

2 65 *Law Quarterly Review* (1949), pp. 22–24.
3 (1868) L.R. 3 H.L. 350.
4 *Wensleydale Peerage Case* (1856), 5 H.L.C. 958.

Then the next great step in the history of the House of Lords in its judicial capacity was that in 1873[5] it was abolished entirely, subject to this, that the Act did not immediately come into force. Before it came into force people woke up to the full horror of a situation in which the House of Lords and the Privy Council in their judicial capacity ceased to exist, and in 1875 that section of the act was repealed.[6] Then in 1876 we get to practically the present state of things, because by Lord Cairns' Appellate Jurisdiction Act[7] there were two Lords of Appeal or Law Lords for the first time. That again is very characteristic of this country. Having had, if I may be colloquial, a great flare-up about the suggestion that Baron Parke should be made a Law Lord for life only, in 1876 it seems to have been taken pretty calmly, when Lords of Appeal for life were instituted, and since then nobody seems to have felt that the constitution was tottering because peers have been made for life only. We started with two Lords of Appeal, and, as you know, the number has gradually gone up. It went up from two to four, and from four to seven, and now we are nine. I do not think that our numbers ought to be diminished, because although I have heard rumours that there are people who think that English judges are not hard worked, I can tell them that they little know! If there were fewer of us it would be impossible to man the House of Lords and the Privy Council.

The defence that was urged by Hale and others for the system under which lay peers could, at any rate in theory, and sometimes did in fact, decide cases, was that they were always advised by the judges. It is not done now, because the necessity for it has really disappeared. I think that *Allen* v. *Flood*[8] was the last case in which the judges were summoned. It was customary to get the judges to come and advise the Lords how they should decide. It was said in defence of the system by which lay peers decided cases that it was quite satisfactory, because they always, or nearly always, did what the judges told them.

They did not always do what the judges told them. As early as 1689 I find that in a case in which Titus Oates was concerned

[5] By the Judicature Act, 1873 (36 & 37 Vict., c. 66), s. 20.
[6] Judicature Act, 1875 (38 & 39 Vict., c. 77), s. 2.
[7] 39 & 40 Vict., c. 59.
[8] [1898] A.C. 1.

the House voted in opposition to the unanimous opinion of the judges by 35 to 23, and in *Ashby* v. *White*[9] they reversed the decision of the Queen's Bench by a vote of 50 to 16. That was in opposition to the opinion of the judges.

Then in 1806, when there was a case which aroused considerable feeling in high circles about Lord Hertford's guardianship of Lord Hugh Seymour's daughter, Lord Minto records in his diary: 'The House of Lords made a very discreditable appearance on this occasion, attending in great numbers at the solicitation or command of the Prince of Wales'. Nothing of that kind is likely to happen now.

You will remember another case in which great feeling was aroused, and there was a very large vote on both sides. I mean the great Douglas Case in which one can pardon the lay peers for taking different views, because the Law Lords were themselves much divided. That is a case very familiar to students of the history of Scotland.

I want now to say a little about the incident in 1883. That was when Lord Denman, contrary to what had been laid down in *O'Connell's Case,* insisted on sitting, speaking (as I understand) and voting, although I have been told—I do not think that I have seen this in print anywhere—that he voted by putting up his hand, which, of course, is not in accordance with the best traditions of the House. At any rate, nobody took any notice of it. The case was that of *Bradlaugh* v. *Clarke,*[10] and the question was whether a common informer could sue for penalties imposed by the Parliamentary Oaths Act.[11] Lord Denman was the eldest son of the Lord Chief Justice. He had been called to the Bar. His brother was 'the senior puisne judge, with one exception', as it is put in the *Law Times* of the day, of the Queen's Bench Division, and he himself had sat as Associate under his father, so that he had had some legal experience. The others who were sitting were the Lord Chancellor (Lord Selborne), Lord Watson, Lord FitzGerald and Lord Blackburn. They were divided by three to one. The Lord Chancellor, Lord Watson and Lord FitzGerald were for reversing the decision of the Court below and allowing the appeal, and Lord Blackburn

[9] (1704) 2 Lord Raymond 938.
[10] (1883) 8 App.Cas. 354.
[11] 29 & 30 Vict., c. 19.

was in favour of dismissing the appeal. Lord Denman threw himself into the fray and sided with Lord Blackburn, but it is always said that his vote was ignored. It was very easy to ignore it in the circumstances, because the majority, even with his vote, would have been three to two, but I wonder very much, and I do not quite know the answer to the question, what would have happened if Lord FitzGerald had been persuaded to agree with Lord Blackburn and you had had the Lord Chancellor and Lord Watson on one side, and Lord FitzGerald and Lord Blackburn on the other side, because then the normal result would be that as the appeal did not succeed the appeal would have been dismissed. What they would have done I do not know.

There was considerable excitement at the time, but great reticence in the press. I have looked at *The Times*. There is nothing in *The Times* that I can see to show that Lord Denman was there. There may have been a conspiracy of silence, but the *Law Times* was more outspoken. They gave Lord Denman's record. They said that they believed that he had been called to the Bar as far back as 1833 and for some years had had the benefit of his father's experience on the Bench by acting as Lord Chief Justice Denman's Associate, but then they went on quite warmly to say: 'If this peer be entitled to influence by his vote the judicial decision of the House, so must be the youngest and least experienced nobleman in that august chamber', which is no doubt a perfectly sound conclusion. Then they said, with some rather good alliteration, that there would be grave apprehension for the future of English jurisprudence if cases were to be decided by 'the preponderance of political partisanship and individual views'.

Questions were asked in the House of Commons. Sir William Harcourt said that if Lord Denman's vote had been going to affect the result no doubt a remonstrance would have been addressed to him and he would have been urged not to take any part, but in the circumstances he supposed that it had not been thought necessary to do anything about it. Lord Denman was the last lay peer to be bold enough to try to take part in the deliberations of the House sitting judicially.

Now let me come to what I want to tell you about the latest development. As you know, the House of Commons lost their Chamber completely owing to a German bomb. It was a

most amazing thing, as any one who has seen the result will agree. Everything else in the Palace of Westminster seems to have been comparatively safe. It was like cutting out a slice of a cake. The Chamber of the House of Commons simply went, and everything else stands.

With great generosity the House of Lords allowed the House of Commons to use their Chamber. The result is that the House of Lords has been sitting in the King's Robing Room, which is a very suitable room. It is, I think, about the right size, although it is a little too small for great occasions. The House of Lords has been sitting there whilst building operations are proceeding.

They reached a stage with the building of the House of Commons where the most fearful din was being made, because the builders were driving in piles in order to deal with the central heating, and this was to go on for months. The result was that it was quite impossible for any one to hear himself speak in what is now the House of Lords Chamber.

Then it was said—the Lord Chancellor said it, I suppose—that when the House was sitting, whether in a judicial or a legislative capacity, the work must be suspended, to which the answer came: 'If that is so, we do not know when we shall get the House of Commons ready, because we shall be practically unable to do any work at all'. Then it was put to the House of Lords that they really must consent to sit somewhere else whilst the pile-driving went on. As I have said, the House of Lords cannot sit in two places. The idea was that somehow or other the Law Lords must sit and hear cases in a quiet, comfortable room, and the solution that was arrived at was that it was decided temporarily to refer appeals to a Committee of the House to be known as the Appellate Committee, consisting of Law Lords, sitting in a Committee Room to hear the argument, and then to report to the House. When they had reported to the House the debate, or what is called the consideration of the appeal, would take place in the House, and the House would then vote as it always does on the questions put.

There is this also to be remembered, that before the war the House of Lords used to sit, for legislative business, late in the afternoon. The House normally sits as a legislative assembly on Tuesdays, Wednesdays and Thursdays. The result was that on every day of the week judicial work could go on not only in the morning but for at least a good part of the afternoon.

Then there came the war, and it was very inconvenient to sit so late. The result was that the House began sitting earlier, on Tuesday at 2.30, on Wednesday at 2.30 and on Thursday at 3.30. As I have said, the House cannot sit in two places at once, and thus it came about that the House could sit for judicial business for only comparatively short periods on each Tuesday and Wednesday. It had to adjourn at lunch-time when the House was sitting early, as a legislative body, and could not continue to hear appeals. That cut into the arguments, and undoubtedly it was found to be inconvenient.

Experience has shown that by sitting in a Committee Room as a Committee it is possible to sit for longer hours and more continuously. I want to tell you, because I do not know that great publicity has been given to it, although it was, of course, not overlooked by the newspapers, what was said by the Lord Chancellor on May 11 of last year when this proposal was put before the House. First of all the Resolution was: 'That this House while insisting on the constitutional duties of the House of Lords as the Supreme Court of Appeal, in order to facilitate the judicial work of the House during the emergency caused by the building operations now in progress approves the adoption of the following procedure until such operations are concluded, namely, that all Petitions of Appeal shall after presentation to the House be referred to an Appellate Committee which shall include persons qualified under section 5 of the Appellate Jurisdiction Act, 1876,[12] as amended by any subsequent enactment, with an instruction to hear appeals when and where the Lord Chancellor may determine. Such Committee shall after the hearing make a report to the House, and upon the Motion for the consideration of the report the Lords shall deliver their Opinions in the House, and the House shall thereupon give judgment'. That resolution was carried.

The Lord Chancellor said that he proposed it with very great reluctance, and he explained the reason for it. He said that it was simply and solely a matter of tiding over an emergency. It means, of course, that if you have your Law Lords sitting as a Committee, and if they go on sitting whilst the House is sitting, they may be prevented from taking part in debates as they are constitutionally entitled to do. The Lord

[12] See footnote 7 *supra*.

Chancellor went on to say: 'As a general rule, if any one of their Lordships hearing the case thinks it possible—possible, not probable—that he may be concerned or interested in what is taking place in your Lordships' House, it will be his duty to come here, and, therefore, the Committee will have to be adjourned'. Then he went on to say: 'I hope that the fact that we are taking these steps to meet a temporary emergency will never be used by any one as a ground for saying that that which has been done temporarily in view of an emergency shall become a permanent feature of our constitution'. Lord Simon spoke, and he said that one unfortunate thing, although it could not be helped, was that the change would mean that the Lord Chancellor would not be able normally to preside, because he, of course, must be sitting in the House. If the Committee went on sitting when the House was sitting he would not be able to preside. Although Lord Simon did not say so, others have said and thought that you also deprive yourself of the assistance of some Lords—of, among others, Lord Simon—who are anxious to be present practically continuously during the legislative sittings of the House. Ex-Lord Chancellors have, of course, been very valuable additions to the body of Law Lords.

I do not know for how long the emergency will last. I do not want to express any view, and I have not formed an opinion as to the expediency of the present arrangement. There are these things to be said on one side and the other. There is a tradition, and it is not only a tradition, but it is a fact that peers, whether they are Law Lords or not, are entitled to be present at the debates of the House, and, as the Lord Chancellor said, it may sometimes be their duty to be present. You have the fact that it is most desirable, as Lord Jowitt himself said, that the Lord Chancellor should sit as often as possible to hear appeals. One thing that he mentioned was that it gives him a better opportunity of knowing whom he ought to advise His Majesty to appoint as judges, because he has the opportunity of hearing counsel. That was one of the reasons which he gave, and I think that it is a good one. Those are some of the disadvantages.

On the other hand, I am bound to say that I understand that the Bar find it more convenient to appear in the Committee Room than in the sort of pen in which they were herded in the House of Lords, about which, in a book called *Light Articles*

Only, there are some very amusing comments by Sir Alan Herbert. Then, of course, the arrangement does enable the Committee to sit more continuously. What will happen, I do not know. There are those who think that what was intended quite definitely to be a merely temporary emergency measure to meet an emergency may lead to real and permanent alterations in the procedure of the House. Others think that we shall revert to the previous condition of things. What you think, I do not know, what I think I will not say, and what Jeremy Bentham would have thought we can only speculate. At any rate, you may think that the event throws an interesting light on the way in which things do happen in this country.

I think that that is all that I want to say, except that there has been one other great change, which has deprived me and others of a privilege. If I should happen to commit a felony I shall no longer be tried by my peers.[13]

[13] By the Criminal Justice Act, 1948 (11 & 12 Geo. 6, c. 58), s. 30.

2

ENGLISH PROCEDURE AND PRACTICE, MORE PARTICULARLY IN CRIMINAL MATTERS

THE RT. HON. LORD PORTER

WHEN I was originally considering the question what portion of the law of England I should make the subject of this lecture, not much discussion, so far as I was aware, had recently taken place as to our methods of ascertaining the guilt or innocence of those who were accused of having committed some crime, though much had, and has since, been said and written on crime and punishment.

In this paper I desire so far as possible to leave untouched the question of punishment save in so far as it bears upon the question of the detection of crime and upon the meticulous care taken in the trial of a prisoner in order to avoid exposing any man whose innocence was possible to the barbarous punishments in vogue even up to the earlier part of the last century.

Some preliminary observations, however, I am anxious to make.

In the first place, this is no learned discussion of the history and growth of our present English practice, it is rather an attempt to bring before a generation, which must take up the work where we leave it off, some considerations which at least raise controversies as to the line of its future progress.

Secondly, since I first suggested giving an address on the topic its various aspects have been the subject matter of a good deal of discussion and have been directly dealt with in more than one paper. You must, therefore, forgive me if much of what I say covers familiar ground.

Thirdly, you must again forgive it, if I use some of my personal experiences in illustration of the points I wish to make even when they touch less seriously upon the topics before us.

It is, I think, true to observe that there is a perpetual tendency in all of us to regard the environment, whether material, or mental, in which we live and the practical solutions which we

have adopted to solve the problems with which we are faced as normal and right.

Blackstone's theory that the law of England was as nearly perfect as was possible in human affairs well illustrates this attitude, though he lived and wrote in an age in which a prisoner could not give evidence on his own behalf, and punishment was harsh and vindictive.

Since then the treatment of criminals has been steadily ameliorated, and the question which I am anxious to raise is whether safeguards which were essential to protect those accused of crimes from the undue rigour of the law are necessary today or, at any rate, necessary in their strictest form. The object of the criminal law is, as has often been said, to detect and convict those who are guilty and to acquit those who are innocent. It follows that the lawyer must turn his attention to the best method of achieving this end. It is a commonplace that in both pre- and post-Norman days and indeed up to Tudor times a man was not tried on evidence adduced to the jury but upon his reputation. Indeed until the sixteenth century in the reign of Queen Elizabeth, there was no method of compelling oral testimony. How the jury got their knowledge it was not the business of the Court to inquire. No doubt in most cases some juryman would know the reputation of the prisoner, and at worst information could be sought from those who knew the character of the prisoner even if the inquiry was made outside the Court and behind the back of the accused man.

Today we avoid all considerations of reputation subject to some immaterial exceptions and try a prisoner solely upon the evidence produced in Court.

How strictly we adhere to this principle may be seen in the oath which the jury take, and the charge given to them. 'You shall well and truly try and true deliverance make between our Sovereign Lord the King and the prisoner at the bar whom you shall have in charge and a true verdict give according to the evidence' is the first version.

The second, which I like best, runs, 'It is your charge to say whether he be guilty or not guilty and to hearken to the evidence'.

Or in a later form, 'It is your charge having heard the evidence to say whether he be guilty or not'.

Later I want to consider what evidence ought to be admissible, but for the moment we are concerned with the narrower question, how far a man's reputation should be known to the jury who try him. Most of those who have presided at a criminal trial have had experience of cases where, though the evidence was strongly against the prisoner, the jury felt some doubt and consequently felt bound to acquit. Whereas, on the other hand, they would undoubtedly rightly have convicted him if they had had any glimmering of his real character. In other cases where a jury after long deliberation and considerable hesitation have pronounced a verdict of guilty they have been heard to utter a gasp of astonishment when the list of his previous convictions has been read out, and indeed occasionally in a case where an old lag has been fortunate enough to escape conviction a judge has been known to instruct the policeman in charge of the case to read out a list of the prisoner's previous convictions to the surprise and chagrin of the jury concerned.

The defence of our present procedure is twofold. In the first place, it is said, as is said of all safeguards adopted in our practice, that it is better for some number of guilty persons, ranging in estimate from 10 to 1,000, to escape than that one innocent man should suffer, and, in the second place, that a man is not being tried for what he is but for a particular act which he is said to have done, and therefore his general character is irrelevant.

Both statements have their truth, but it is obviously undesirable and indeed unsocial that any guilty man should escape, though no doubt it is inevitable that conviction should not be possible in all cases if the innocent are to be duly protected.

In early English trials the character of the accused was not, as I have indicated and as is well known, disregarded—indeed it was an important, if not the only important, consideration. Even today there are those at any rate amongst the laity who advocate its admissibility. I remember an Englishman against whom a fraudulent action had been brought in a foreign country, the name and even the language of which shall remain unidentified, telling me he was required to give evidence for the defence at the trial about to be conducted in the unnamed country. When he reached his destination, somewhat to his surprise, he received a message that the judge who was about to

try the case would like to see him at his home. He accordingly presented himself in due course and, after some desultory conversation, his host asked him what sort of people the plaintiffs in question were. 'I don't know that I ought to express an opinion', the defendant replied, 'because you know, I am an interested party'. 'Oh, never mind that', said the judge, 'I like to know the character of the people I am dealing with'.

Thus encouraged the Englishman told what he knew of his opponents and went home to bed a little astonished at the local methods of ascertaining the facts of a case. On the next day the case was called on, the plaintiffs and their witnesses were examined and cross-examined without any spectacular result, and undoubtedly when they had finished some sort of case had been made out though it was a very poor one. Nevertheless without calling upon the defence the case was dismissed with costs.

Justice no doubt was done, but if evidence of character is to be given at all, I think most people would prefer it to be given in public and in face of the opposing side.

But to some extent this is not our practice so far as the judge is concerned. In a criminal case he is furnished with the accused man's previous record, and I have always felt that the distinction between judge and jury in this respect is a little anomalous. No man however impartial can be sure of hearing the reputation of another without being to some extent influenced by the knowledge. It may of course be said that the effect is justified provided no undue emphasis is placed upon it and that a judge's training enables him to avoid being too much affected by it. But this is to affirm that evidence of bad character should have weight, but not too much, and supports Jeremy Bentham's speculations on evidence, as stated by Sir James Fitzjames Stephen in the words, 'The leading principle of Bentham's speculations was that all objections to evidence ought to be not to its admissibility, but to its weight'. It was in accordance with this view that the master of a ship on one occasion first asked whether the Court knew before verdict the character of the man about to be tried and when he was told that the judge did but the jury did not, declared that he believed in knowing the character of the man he was going to try before he heard the charge.

I think Lord Bramwell would have agreed with the opinion

that a man's character should be admissible against him as well as in his favour. Writing in the *Nineteenth Century* in 1892, he said: 'If a man is called as a witness in his own cause, his means of knowing, his intelligence, his honesty are matters to be ascertained as much as is the case of any other witness. . . . It is said that great injustice would be done and that the prisoner would be convicted not for the offence charged but because he had committed offences for which he had been tried and punished. . . . But assume the convictions proved, and assume it induced a probability of the man's guilt in the judge's mind, would it only do so because that was a natural and probable result of the evidence. If so, why should the evidence not be given? I do not believe that the minds of the judges would be diverted from the question they had to try. . . . Moreover, as I have said, the grossest injustice is done when a man of undoubted good character is opposed to one of undoubted bad character, and yet they are treated as on an equality'.

'*De omni homine præsumitur quod sit bonus homo donec probetur in contrarium*', says Bracton. Yes! but what proof of bad character is required. May it not be urged that the presumption may be rebutted out of the man's own mouth even if not by extraneous evidence. No doubt the danger of being prejudiced is greater in the case of a jury than in the case of a judge. Indeed I have heard it said that if a man's previous bad character were disclosed to a jury, a prisoner who had once been convicted would never escape whether he was guilty or not. On the other hand, in a case where the previous convictions could not be concealed I have known the accused man's misfortune used to excite the sympathy of the jury and not always without success.

In raising these questions I am not presenting any opinion of my own but rather putting them forward for the consideration of a generation which in its turn may have to solve old problems in fresh ways or at any rate reconsider them in the light of altered conditions.

The next matter which I put forward for your consideration is the admissibility of evidence from the accused man himself. This question has in the course of the history of English law been resolved in a manner which bit by bit has completely altered its complexion. Down to the civil wars the interrogation of a

prisoner on his arraignment formed the most important part of the trial in spite of the maxim which was even then recognised '*nemo tenetur accusare seipsum*'. By the Evidence of the Accused Acts of 1553 and 1555 accused persons were required to submit themselves to the examination of Justices of the Peace and were in fact accustomed to be straightly questioned by them. This practice remained in force up to the revolution of 1688. Soon after that date however the practice of questioning the prisoner died out. By that time the rules of evidence obtaining in civil matters had been applied in the criminal courts, and the rule that a party was incompetent as a witness had been adopted in criminal cases. The result was that from the end of the seventeenth century a prisoner was not allowed to give evidence, nor indeed was he permitted to call witnesses until the second half of the seventeenth century, nor until the reign of Queen Anne was a prisoner charged with felony less than treason able to insist as of right that the witnesses in his favour should be examined on oath. The sequence of Acts which finally changed the law in this respect did not come into force until early in the last century. In 1843–1844 persons interested in a cause were first allowed to give evidence. This was followed by an Act of 1851–1852 which I believe came into force in 1853 whereby parties in a civil case could be heard as witnesses. My generation of novel readers will always remember that in the famous case of Bardell v. Pickwick, where Mrs. Bardell was suing for breach of promise and Mr. Pickwick was defendant, neither party was capable of giving evidence, and it was left to Mr. Samuel Weller to explain that, 'Yes, I have a pair of eyes that's just it. If they wos a pair o'patent double million magnifying gas microscopes of hextra power, p'raps I might be able to see through a flight o'stairs and a deal door, but bein' only eyes you see my wision's limited'.

I doubt however whether the present generation has heard of either of the parties and some not even of the *Pickwick Papers*.

The rule was defended on the ground that it prevented the jury from being deceived by false evidence. 'Experience proves', says Starkie in his book on evidence published in 1824, 'that more mischief would result from the general reception of interested witnesses than is occasioned by their general exclusion';

and D. MacKinnon is even more explicit: 'The rules', he says, 'of evidence in particular instances to the unthinking may appear illiberal or arbitrary in their operation, and while they encroach upon the discretion of the lay tribunal may partially exclude some sources of precarious information on grounds of conjecture. But we should consider always whether any relaxation of the rule suggested by the seeming hardship of perhaps one eccentric case would not operate to the detriment of a thousand others by committing them to the opinion of a jury and the fallacious experiment of hearing a witness prone to deceive others and perhaps himself also'.

In spite of these views the Acts already mentioned dealing with evidence in civil causes were passed and were followed in, but not until, 1898 by the Criminal Evidence Act which permitted an accused man to give evidence on his own behalf. But this permission was hedged about by strict limitations enacted for the protection of the prisoner. It was *his* choice whether he should give evidence or not and *his* or *her* choice whether his wife or her husband should be called. Communications between husband and wife were protected. The prisoner was not to be cross-examined about any offence other than that charged unless he put his character in issue or attacked the prosecution witnesses or his fellow accused.

Finally no reference can be made by the prosecution to the fact that the accused man did not go into the box, though the judge may comment upon it.

Even in the form adopted this change was hotly resisted partly because it was said that 'experience proves that men's consciences grow so large that the respect of their private advantage rather induces man to perjury'—an argument which would and did rule out the evidence certainly of those who knew most about the facts of a case and in many cases that of those who alone knew them. It was further said to be to the prisoner's advantage that he should not be permitted to go into the box where he might destroy his own case.

As regards this objection I do not know that one need protect men against the consequences of their own admissions. The strength with which it was urged was, I think, a consequence of the brutal punishments inflicted upon those found guilty of the offences with which they were charged. Judges by their tech-

Starke

nicalities and juries by turning a blind eye to the evidence were apt to acquit where the obvious verdict was one of guilty. This aspect of British justice is amusingly brought out in the report of M. Cottu, who was sent by the French Government in 1822 to inquire into the administration of criminal justice in England. He says, 'The English not thinking it for the advantage of the public to punish every crime committed lest the effect of example should be weakened by the frequency of executions, they reserve the full measure of their severity for the more hardened offenders and dismiss unpunished those whose guilt is not proved by the most positive testimony. So much the worse for him against whom the proofs are too evident, so much the better for the other in whose favour there may exist some faint doubt'. In the Latin phrase, '*Terror in omnes, pœna in paucis*'. This attitude is, of course, to confound guilt with punishment and to forget that the certainty of conviction is a greater deterrent than the expectation of an unduly severe sentence, if the culprit is convicted, mitigated by a reasonable chance of escaping conviction even in the case of a guilty man. That the right to give evidence is of advantage to the innocent and a help towards the conviction of the guilty is, I think, plain enough. Even before the Act was passed Sir James Fitzjames Stephen, writing from his experience, said 'A poor and ill-advised man is always liable to misapprehend the true nature of his defence and might in many cases be saved from the consequences of his ignorance or misfortune by being questioned as a witness'. And Bentham expressed his views with his accustomed vigour when he said, 'If all the criminals of every class had assembled and framed a system after their own wishes, is not this rule the very first which they would have established for their security? Innocence never takes advantage of it; innocence claims the right of speaking, as guilt invokes the privilege of silence'.

Under the Act of 1898 the accused is a competent but not a compellable witness. Is this limitation, it may be asked, of advantage for the elucidation of the truth, and is the further provision which prohibits cross-examination as to credit a help towards the acquittal of the innocent and conviction of the guilty?

So strict a limitation was not always insisted upon. The Royal Commission which had prepared the Draft Criminal Code

of 1879 suggested that cross-examination relating to the credit of the accused might be permitted but the Court might circumscribe it to such an extent as it should think proper; and some years later but before the passing of the Criminal Evidence Act, Hawkins, J., in addressing the Grand Jury at Hertford Assizes, said that in his view, 'Every prisoner should be able to give evidence on his own behalf and be able to call his wife also if her evidence would assist his case'; but, of course, he went on, 'they must be subject to cross-examination just the same as every other witness so that the jury might be able to ascertain from their antecedents whether or not they were worthy of belief upon oath'.

There are thus two issues to be considered

(1) Should a prisoner be not only a competent but also a compellable witness? and

(2) Should it be permissible to cross-examine him as to his antecedents?

In asking these questions I am not making any suggestion that we should adopt the continental system under which witnesses may be examined before a *Juge d'Instruction* privately in the absence of the accused, and where the accused man himself is in turn the subject of private and hostile examination by the judge. Owing to our upbringing this practice is repellent to the average Englishman, though I remember a colleague of mine who had been attending the French criminal courts saying that though their methods were different from ours they seemed to arrive at as correct a conclusion as we did. But secrecy is undesirable, and the strongest supporters of a change have never gone further than to suggest that the prisoner should be examined with no greater limitation than that applied to any other witness and like him in open court.

Even though his credit was unimpeached, a guilty man, if compelled to go into the box, might find it difficult to escape conviction in a case where under the present practice his chances of acquittal depend upon his keeping out of the box and avoiding cross-examination. I remember trying an indecent case at the Old Bailey, where the accused was plainly guilty and must have been convicted if he had given evidence. Very prudently his advisers did not tender him as a witness, and, as the case was so clear, I did not think it necessary to point out to the jury that

the accused man had not gone into the box. When I had summed up they sat discussing this case together for a time and then the foreman turned to me and said, 'We don't like convicting a man of this class of offence unless we have heard what he has to say'. I pointed out in answer that whether he went into the box or not was a matter for the prisoner himself and for his advisers and that the jury might well ask themselves whether an innocent man would not have done so. They consulted again and repeated that they did not like to convict unless they heard the prisoner, and when in my turn I repeated that the giving of evidence or withholding it was for the prisoner alone the foreman said, 'But can't you make him go into the box?' I had to confess that I could not and in the end they disagreed. No doubt the result was to give the accused man a sporting chance, but is that the object of the criminal law? In short, does an innocent man object to going into the box and giving evidence on his own behalf or does he welcome the opportunity of clearing himself? And further, is it unfair to cross-examine the accused as to his character, and in general should the attitude of the law be that every man is presumed to be of good character until the contrary is proved—a maxim in use since Bracton wrote, '*De omni homine præsumitur quod sit bonus homo donec probetur in contrarium*', or should the law stand neutral and wait for enlightenment?

A further important principle of English criminal procedure is its method of dealing with confessions and the general practice which it follows under the guidance of the so-called Judges' Rules. The ordinary man putting his trust in the light of nature would, I imagine, think that if a prisoner wished to confess to the commission of a crime he should be allowed to do so. At the moment no question arises as to questioning or coercion in order to induce a prisoner to speak. Of his own motion he desires to make an acknowledgment of his guilt. Yet the taking of such a statement is what the Judges' Rules forbid unless a caution is first administered. At all stages after he has made up his mind to charge a man a constable is warned to caution him before taking a statement. Rule 4 says in terms, 'If the prisoner wishes to volunteer any statement the usual caution should be administered', and Rule 7 provides that a prisoner making a voluntary statement may not be cross-examined.

The usual caution is to be found in Rule 5 and runs as follows: 'Do you wish to say anything in answer to the charge? You are not obliged to say anything unless you wish to do so, but whatever you say will be taken down in writing and may be given in evidence'. It is true that the additional words 'against you' are not to be used, and it may therefore be urged that the caution is an incitement to the accused to give evidence rebutting the charge, but in truth it is recognised as, and in fact it is, a warning to the guilty man to keep his mouth shut. Finally in Rule 8 it is provided that if two or more persons are charged with the same offence and separate statements are taken from each, those statements are not to be read to the others, but each should be furnished with a copy and no reply should be invited.

The Rules themselves were not drawn up until 1912, but they embody an older practice. It may well be that cross-examination before the hearing is undesirable, but is it necessary in the interest of justice to discourage a prisoner from making a true confession of his guilt; to warn him that he speaks at his peril and to give him time, if so minded, to think over and invent a defence at his leisure?

Again, why should persons charged with the same crime be given copies of the statements of their co-accused? There may be reason for not questioning them upon their fellow-prisoners' statements but why furnish them with copies, destroy the element of surprise, and not only enable them to see the weaknesses of their own case but give them an opportunity of preparing invented evidence to assist in their acquittal?

It was entirely in accordance with this practice and before the compilation of the Rules that a prisoner arrested in one of our Assize towns when asked where he was at a certain time replied, 'You . . . well find out', and that his counsel addressing the jury said in his final speech, 'and gentlemen, when asked by the policeman where he was at the relevant time the prisoner answered so improper a question in words of which except for one adjective I am convinced you would approve'. So strictly is the rule observed that where the prisoner was told by a constable at 10 a.m. that it would be better for him to tell the truth, an admission by the prisoner to another constable after 5 o'clock on the evening of the same day was not allowed to be given in evidence, although the second constable had, before the prisoner

made the admission, cautioned him not to say anything to incriminate himself.[1]

Furthermore the warning to the prisoner that it may be advisable for him to keep silent is not confined to the period during which he is being dealt with by the police. In 1848–1849 it was enacted that magistrates and Justices of the Peace should caution prisoners that they need not say anything in answer to the charge unless they pleased. To the same effect is the custom when asking an undefended prisoner whether he wishes to give evidence or not to tell him that he need not give evidence unless he wishes, that if he does he will be subject to cross-examination and that he has the alternative of making a statement from the dock if he so wishes without being subject to cross-examination.

A good deal of criticism has of late been directed against the protection afforded to an accused man from being questioned publicly in Court, though the dangers of secret questioning are freely admitted. Even in the latter half of the last century the technicalities of evidence were questioned.

Sir James Fitzjames Stephen writing in 1882 pointed out that the prisoner is absolutely protected against all judicial questioning before or at the trial, and that on the other hand he and his wife are prevented from giving evidence on their own behalf. He continues, 'He is often permitted however to make any statement he pleases at the very end of the trial when it is difficult for any one to test the correctness of what is said'. He goes on to point out what is good and what is bad in the system. 'It is', he says, 'I think highly advantageous to the guilty'. On the other hand, he is of opinion that it contributes greatly to the dignity and apparent humanity of a criminal trial; that it effectually avoids the appearance of harshness not to say cruelty which often shocks an Englishman under other systems and adds what is I think an important consideration, *viz.*, that the fact that a prisoner cannot be questioned stimulates the search for independent evidence with the result that the evidence in an English trial is usually much fuller and more satisfactory than that forthcoming in the criminal courts of other countries.

The same suggestion has been more dramatically put in one of his footnotes where he quotes from one accustomed to the practice in certain Eastern countries: 'There is a great deal of

[1] *R.* v. *Doherty* (1874), 13 Cox, 23 and 24.

laziness in it' (*i.e.* in the failure to search for evidence). 'It is far pleasanter to sit in the shade rubbing red pepper into a poor devil's eyes than to go about in the sun hunting up evidence'. 'On the other hand', he says, 'I am convinced by much experience that questioning, or the power of giving evidence is a positive assistance, and a highly important one to innocent men, and I do not see why in the case of the guilty there need be any hardship about it'.

These are I think the vital considerations when a suggestion of changing the law in these respects comes in question.

The matter, however, must not be looked at merely from the point of view of what is the more convenient or effective way of administering the criminal law. Important as those considerations are there is another circumstance of even more consequence. The law must not only be efficient—it must be popular.

In his *Outlines of Criminal Law* Professor Courteney Kenny states, 'The restrictions imposed by the English Rules of evidence are in startling contrast to the laxity of proof allowed in Continental tribunals. But the constitutional value of our stringency is great, for it has done much towards producing that general confidence in our criminal courts which has kept popular feeling in full sympathy with the administration of the criminal law and has thereby facilitated the task of government to an extent surprising to Continental observers'.

No one can doubt that confidence in and the popularity of the criminal law are its most essential elements, and even if it be an English characteristic to feel too much sympathy for the underdog that feeling must be allowed for and taken into consideration in framing our law and procedure.

No one would wish to go back to the pre-revolution times when a criminal trial was apt to consist of an altercation between the accused, the prosecutor and his witnesses and even the bench itself. Nor indeed do I imagine that any would now wish to repeal the Criminal Evidence Act of 1898. But it still has to be determined whether we do not treat a criminal inquiry too much as a game and allow ourselves to be hide-bound by rules according to which one must play fair, giving the criminal a sporting chance without considering whether it be for the benefit of the community or not.

It may be that the best results are obtained by these measures: that they represent the only safe or at any rate the safest means of elucidating the truth in the majority of cases. But they are evidently not ideal. On the contrary, it may be we should put a greater trust in our juries and not hold judges alone to be capable of placing the right emphasis on different kinds of evidence. The well-being of the community as well as that of individuals is at stake, and it may be that by regarding the latter too highly we jeopardise the interests of the State. In any case with changing times and altered circumstances the rules of criminal procedure require fresh consideration, and the remarks which I am concluding are meant to suggest some of the points which have been in controversy in discussions upon the soundness of our legal system.

We of the old guard are likely to be somewhat conservative in our outlook, but even we cannot neglect the question whether a less lenient practice might not vastly decrease the amount of crime perpetrated and the number of prisoners and so prove more merciful in the end.

3

THE REFORM OF THE LAW OF MURDER

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Although the purpose of this paper is to consider the definition of murder in the first instance, and the penalty to be attached thereto only incidentally, it is impossible to begin without reference to the recent agitation in Parliament and the press for the suspension—by which its advocates admittedly envisaged the abolition—of the death penalty. That episode, whichever side one may take, exemplified some of the most attractive aspects of British democracy—the essential kindness of heart, the deep respect for religion and the courtesies of controversy on such topics, which are ingrained in the British people. But these very qualities created a difficulty for those who were prepared to go a long way but not the whole way with the abolitionists, and who felt that, like all enthusiasts, they often overstated their arguments and sometimes presented highly controversial statements as incontrovertible fact.

Without waiting to cavil about details, two points about the controversy call for comment; namely the general disinclination to speak of the retributive aspect of punishment, and the general assumption that entirely different considerations must govern the death sentence from those applicable to any other penalty whatever—as if all serious punishment were not irrevocable.

Both these views, that punishment should not be retributive and that the death sentence is in a class by itself were held by devout Christians; but it is permissible to say that others, equally devout and equally thoughtful, have in all ages taken and still take an opposite position.

The retributive theory of punishment has suffered in recent years from two lines of criticism, one historical, the other quasi-philosophical. Some historians appear to hold that it developed out of primitive notions of vengeance. But admitting that there is an element of truth in this, the half truth is, as often, a

complete misrepresentation. The primitive avenger of blood does not concern himself with the moral state of his enemy's mind. The philosophical argument—namely that, since there is always a variable element in applied ethics depending on the society concerned, therefore there is no such thing as a permanent moral standard—is merely part of the prevailing pessimism of the present day. But surely the retributive theory of punishment is inescapable. What possible right can we have to reform any man except on the footing that there is a taint in his character which ought to be eradicated? What right have we to deter him or others like him unless the courses from which we deter are evil courses? And, above all, what right have we to protect the society in which we live unless we are sure that it is so far a moral organisation as to render attacks on it in themselves immoral? To say that the self-protection of society is the only justification for punishment is perhaps the most dangerous doctrine of all. Remove the ethical element, and we are in danger—logically at least—of falling into the error of the totalitarian states, error which leads straight to such sentences as those on Petkov and Mindszenty. We may flatter ourselves that we are temperamentally incapable of pushing logic to such monstrous lengths or of identifying a single party with the State. But are we sure? Our past history with its long line of politico-judicial murders—More, Raleigh, Strafford, Laud, Charles I, Russell and others—may serve to remind us that for centuries of our history it was not so. There is a world of difference between the procedure in Laud's case and that in Mindszenty's; it is hard to discover much difference in the object aimed at and achieved, namely the liquidation of a political opponent in the supposed interests of a party which identified itself with the State.[1]

However conscious we may be and indeed ought always to be of our own shortcomings and imperfections, the judicial necessity for passing judgment on moral grounds (every time a prisoner is convicted) is, we repeat, inescapable. The instinct represented by the language of the man in the street is a perfectly sound one: he speaks of the convicted man having 'got what he deserved', or it may be more or less then he deserved. The moral element

[1] That Laud himself similarly identified his own party and his Church with the State merely emphasises the warning against such a line of argument.

in sentence is the lynch-pin which holds together all the other possible objects of punishment and without which all punishment becomes at best an amoral and at worst an immoral proceeding. It is difficult to see how any man could continue to administer the graver forms of punishment—not only death but penal servitude and even imprisonment with hard labour—without being obsessed by a weary futility unless he were convinced of the ethical necessity for his sentences. What judge would be content to inflict the so-called life sentence—in plain English to inflict on a fellow being not less than sixteen and a half years of unhappiness or worse—if he did not feel that the prisoner before him deserved such a fate? It is, we submit, equally logical in extreme cases to hold that the death sentence is justified and ought on moral grounds to be carried out. Perhaps that of the Nazi mass murderers is the best known; their opportunities for evil were exceptional; but there are others: Palmer, the Rugeley poisoner, who thought he was only convicted of one murder had undoubtedly been making a regular practice of murder for sordid gain; Burke and Hare; George Joseph Smith, who trapped three young women into marrying him and then murdered them for the petty financial gain: Fox, who murdered his own mother for the sake of her insurance money and her inheritance; the Leopard Societies in Africa, who murder adolescents in order that glands taken from their bodies may be used for the rejuvenation of elderly roués. The lives of such men are justly forfeit; and if their death can deter others, it is they, not we, who have degraded human life to a chattel. There is not the smallest reason to suggest any excuse of mental abnormality for any of these men, even if it may possibly be urged for some of those sickening sadistic cases, very few of which ever find their way into the public press, but with which every judge of experience in criminal cases has had to deal. Lord Roche—certainly the very reverse of a 'hanging judge'—quoted two such cases in the House of Lords when speaking for the retention of the death penalty. This essential truth regarding all punishment (except perhaps the most trivial) has been well stated by a great and devout judge, the late Sir Edward Fry,[2] who, though

[2] See *Studies by the Way* (1900), pp. 51–53 cited in Mercier, *Criminal Responsibility*, pp. 13, 14.

a Chancery judge, himself exercised criminal jurisdiction. He says:—

> 'Here we seem to be near a fundamental fact of human nature, a moral element incapable of further analysis (so far at least as my chemistry goes),—the fact that there is a fitness of suffering to sin, that the two things, injustice and pain, which are both contrary to our nature, ought to go together, and that in consequence we naturally desire to bring about an association of the two where it does not already exist. . . . Punishment, in short, is an effort of man to find a more exact relation between sin and suffering than the world affords us. . . . In a word, then, it seems to me that men have a sense of the fitness of suffering to sin, of a fitness both in the gross and in proportion; that so far as the world is arranged to realise in fact this fitness in thought, it is right; and that so far as it fails of such arrangement, it is wrong, except so far as it is a place of trial or probation; and consequently that a duty is laid upon us to make this relationship of sin to suffering as real and as actual and as exact in proportion as it is possible to be made. This is the moral root of the whole doctrine of punishment'.

He does not, be it noted, say—indeed, no judge of experience even fifty years ago could have said—that it is possible to proportion suffering exactly to sin, but merely that our moral sense commands us to make the attempt. Punishment is not and never will be an exact science. Increasing knowledge of the springs of human frailty may render the task more difficult but not less imperative.

In this spirit, therefore, let us examine the problem of capital punishment. It is a noteworthy fact that the crimes for which it is prescribed—treason, spying in time of war, murder—are those which are committed with the widest variety of degrees of moral guilt, and for which therefore one unvarying penalty is least appropriate. The commoner crimes, robbery, extortion, burglary, forgery, and the like are seldom anything but expressions of humdrum wickedness, nor do they often present us with difficult psychological or moral problems. But high treason, spying and even murder, though in some cases indicating the deepest moral depravity, are in other cases sometimes committed from noble and altruistic motives. Even a staunch Hanoverian may

revere the memory of Balmerino and Derwentwater, though hardly (except as a courageous old rascal) that of Simon, Lord Lovat. The Provost-Marshal who presided at the execution of Lody shook hands with that gallant German gentleman before giving the order to fire; but Matahari was in quite a different class. Depraved though the practice of ritual murder normally is, it is impossible not to honour the motives of the African Paramount Chief who some years ago sacrificed his only son in order to win from the jealous fates a rainfall for his famine-stricken people. The murder of a spouse is often a foul crime: but how about the loving wife who some years ago acceded to the entreaties of a cancer-stricken husband to put him out of his agony, though in so doing she believed herself to be facing the certainty of an ignominious death here and the risk of eternal punishment hereafter? Even in cases at a much lower spiritual level than this, the degrees of guilt and the possible excuses and palliations for taking human life are far more numerous and more cogent than they are for any other crime. We are not suggesting, it need hardly be said, that such cases should go scot free. But no judge should be required to go through the grisly formality of pronouncing the death sentence in cases in which it would revolt his conscience if it were carried into effect. Down to 1861 the judges had at any rate a formal power, instead of pronouncing sentence, to direct that it be recorded—a direction which had the effect of a life sentence. Is the dignity of justice really upheld by pronouncing with the maximum of dramatic effect a sentence which everybody in Court—except perhaps the poor creature in the dock—knows will never be carried out?

The first necessity, therefore, seems to be a reconsideration of our definition of murder and of the exceptions which can be pleaded in defence. Indeed the only thing that can be said in favour of the definition to be found in any of the standard text-books is that it is increasingly disregarded in practice. Judges today sometimes find themselves compelled to lay down rules of law which they neither expect nor desire juries to follow.

Let us compare the statement of the law in Stephen's *Digest of the Criminal Law,* which may be taken as a standard authority in England, with the Indian Penal Code. We shall find the latter to be both more reasonable and more humane. In each case the general lay-out is the same: a definition of what

in Stephen is called 'unlawful', or in the Code 'culpable' homicide, followed by a definition of the considerations which make such homicide murder, this being followed in turn by a list of exceptions, successful proof of which by the accused will remove his act from the graver to the lesser category. The exceptions which have the effect of a complete defence—such as private defence of person or property, insanity, public duty—are dealt with elsewhere in the *Digest* and the Code since they apply not only to homicide but to other offences also. Here then, in the briefest possible form, is the comparison between the two general definitions and between the two definitions of murder.

I. *General definition* (including both manslaughter, or culpable homicide, and murder)

STEPHEN	INDIAN PENAL CODE
A. (a) Intent to cause death.	A. (a) Intent to cause death.
(b) Intent to cause bodily harm.	(b) Intent to cause such bodily injury as is likely to cause death.
(c) Commonly known to be likely to cause death.	(c) With the knowledge that the act is likely to cause death.
(d) Commonly known to be likely to cause bodily harm.	(d) [*No parallel provision.*]
B. An omission, amounting to culpable negligence, to discharge a duty tending to the preservation of life.	B. [No *directly* parallel provision but *cf.* Section 32 'Words referring to acts extend also to illegal omissions' and Section 304A, 'Causing death by a rash or negligent act'.]
C. Death caused *accidentally* by an unlawful act.	C. [*No parallel provision.*]

II. *Special definition of murder* (subject to exceptions, see below)

STEPHEN [3]	INDIAN PENAL CODE
(a) Intent to cause death.	(a) Intent to cause death.

[3] Omitting the redundant phrase 'malice aforethought'. This phrase is essential to an understanding of the historical development of the law, but it serves no useful purpose at the present day and merely introduces an unnecessary step into the definition.

(b) Intent to cause grievous bodily harm.	(b) (i) Intent to cause such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused. (ii) Intent to cause bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death.
(c) Knowledge that death will be the probable result.	(c) *Knowledge* that the act is so *imminently dangerous* that it must in all *probability* cause death or such bodily injury as is *likely* to cause death.
(d) Knowledge that grievous bodily harm will be the probable result.	(d) *See the concluding words of* (c) *immediately above.*
(e) Intent to commit any felony OR (submitted by Stephen's latest editor) intent to commit any felony of such a kind that the actual commission thereof would involve the use or at least the threat of force against the person killed.	(e) *No parallel provision.*
(f) Intent to oppose by force any officer of justice known to be such in the execution of certain duties.	(f) No *exactly* parallel provision [protection to officers of justice is given by restricting the pleas of private defence and provocation.]

It will be convenient if we take first the fictitious elements in the English definition, the doctrines which are conveniently known as constructive murder and constructive manslaughter. These will be found in I (c) and II (e) and also to some extent in I, A (b) and (d) and II (d) and (f), on the English side of the above comparisons.

The doctrine, as it was stated by Foster and by almost every writer of repute from Foster's day down to and including the 1926 edition of Stephen's *Digest,* was that death accidentally caused in committing any felony was murder, death accidentally caused by any other unlawful act was manslaughter. Such an

accident would also be murder if it occurred in resisting the officers of justice, even though the resistance was not a felony; and death, even though it was a result which no reasonable man could be expected to foresee, would be manslaughter if the accused intended bodily harm and murder if he intended grievous bodily harm—though there is no definition of bodily harm (which may be quite trivial), and even of grievous bodily harm the nearest approach to a definition is that in *R.* v. *Ashman,*[4] by Willes, J., who held that it need not necessarily be either permanent or dangerous. 'If it be such as seriously to interfere with comfort or health it is sufficient'. In fact the intent to cause even grievous bodily harm may fall far short of the point at which death is at all a likely or a foreseeable consequence.

The word 'constructive' is merely an unduly polite term for 'fictitious'—that is to say for debiting a man with a crime which he has not committed merely because he has committed some lesser crime. Such a doctrine is, as a learned writer[5] has recently said, a disgrace to English jurisprudence; and it ought to be abolished by statute. The doctrine is not merely barbarous; it is also ridiculous, as Macaulay conclusively demonstrated as long ago as 1837.[6] To give an illustration; passers-by are sometimes injured by flying splinters of broken glass in a smash-and-grab raid. Suppose such an injury should prove fatal (a very unlikely but not an impossible event), the raiders would be constructive murderers. In what way is their guilt different from hundreds of other raids of the same kind in which no such fatality occurs? In India there have been numerous cases where X suffering from spleen disease unknown to Y has died as a result of a blow or kick from Y. Indian law does not in such a case allow Y to be held criminally liable for anything but the usual trifling hurt which he intended or knew himself to be likely to cause.

It is trite learning that the petty jury is the 'palladium of our liberties': not, we submit, because it is a particularly good judge of fact (indeed it is only so, so far as it is guided, as it usually is, by lucid exposition from the Bench), but because it is, quite literally, a good judge of law. It judges the law; and does not hesitate sometimes to condemn the law, if it feels the

[4] 1 F. and F. 88.
[5] P. A. Landon in (1949) 65 *Law Quarterly Review,* p. 104.
[6] Draft Indian Penal Code Appendix, note M.

law to be harsh or cruel or, in the memorable words of Mr. Bumble, that 'if the law says that, the law's a hass'. It was the resistance of juries which killed the other historic instance of fictitious crime—namely, constructive malice in the law of libel; and it is the resistance of juries which is slowly but surely reforming the law of murder. Even in 1926 the chances of getting any jury to uphold this archaic doctrine must have been very small. Today, both doctrines are either dead or moribund; and it is worth inquiring whether the attempts which are occasionally made to state them in more restricted terms serve any useful purpose.

This doctrine of constructive murder in the more restricted form of death accidentally caused in committing a felony involving violence to the person is still held to be good law on the strength of *Beard* v. *D.P.P.*,[7] *R.* v. *Betts and Ridley*,[8] *R.* v. *Stone*,[9] *R.* v. *Jarmain*,[10] as well as the older case of *R.* v. *Serné*.[11] But it is respectfully submitted that it was not necessary to the decision of any of these cases, and that the decision of all of them by Indian law, without the application of any such artificial doctrine would have been the same. A man who in order to rape a child (as in *Beard's Case*) or a grown woman (as in *Stone's Case*) throttles her, is asking too much of human credulity if he expects us to believe that death was merely an 'accidental' result of throttling. In each case, may be, his intention was merely to stifle her cries: but he must have known death to be the probable result, and in *Beard's Case* drunkenness, though it may in some circumstances negative *specific* intent, is no excuse for ignorance.[12] The same is equally true of *Jarmain's Case*. If a man points a loaded pistol at a woman in order to compel her to give up money, and on her refusal pulls the trigger, the suggestion that he 'did not intend' to shoot her is an insult to the intelligence of the jury. There was no question of a struggle for possession of the pistol in which it might have gone off accidentally. In *Betts and Ridley's Case* the jury actually arrived at their verdict without the aid of this constructive

[7] [1920] A.C. 479.
[8] (1930) 144 L.T. 526.
[9] [1937] 3 All E.R. 920.
[10] [1946] K.B. 74.
[11] (1887) 16 Cox C.C. 311.
[12] Cf. section 86 Indian Penal Code.

doctrine: they found, that is to say, that the victim was killed by a single violent blow intended, as was clear on the evidence, to have the maximum force and effect: and the enunciation of the 'constructive' doctrine in the Court of Criminal Appeal was therefore otiose. In *R.* v. *Serné* Stephen himself was the judge. He expressed his dislike of the term 'constructive murder' and though he did actually enunciate the doctrine which is commonly known by that name, there was ample evidence in the case to show that the accused intended to kill his son, or at the very least that he set fire to the house knowing well that the son's death was a probable result. There need have been no question of punishing him for an accident, for there was no accident.

We turn to the doctrine of constructive manslaughter. Stephen's latest editor says that this has been 'virtually abolished' by the case of *Andrews* v. *D.P.P.*[13] With due submission, this does not appear to be accurate. That the doctrine is still very much alive is clear from the words of Humphreys, J., in the Court of Criminal Appeal in *R.* v. *Larkin*.[14] His Lordship would go no further in qualifying the crudity of the original conception either in regard to manslaughter or murder than by adding that the unlawful act or felony must be 'likely to injure'. The defence of accident was hardly raised, and one may fairly submit was disproved by the evidence. Women's throats do not get cut 'by accident.' Such a deep wound requires considerable muscular force. The case is chiefly remarkable for the trial judge's attempt to extract a reason from the foreman of the jury, and for the contradictory character of the latter's replies. It seems possible that these doctrines of constructive homicide, and the similar doctrine, negatived in *Woolmington's Case*,[15] which threw on an accused person the burden of proving his own innocence survived so long from a feeling on the part of the judges that juries had neither the mental training nor the experience to grasp any but rough and ready rules. That may perhaps have been so in Foster's day, when probably ten out of every twelve common jurors were totally illiterate: but is it so today? Might not that foreman have

[13] [1937] A.C. 576.
[14] (1942) 29 Cr. App.R. 18.
[15] [1935] A.C. 462. The old doctrine is still embodied in certain Colonial Codes which require amendment in this as in other matters.

given a sensible answer if he had not been befogged with an unnecessary fiction?

Having disposed of the fictitious element in crimes of homicide, it may be well to explain the attitude of Indian law to illegal omissions and to contrast it with the English law. In English law a man is guilty at any rate of manslaughter if his omission to perform a legal duty amounts to gross negligence—a somewhat vague term of which the nearest approach to a definition is that given by Lord Atkin in *Andrews* v. *Director of Public Prosecutions,* above cited. Deliberate intent and gross negligence are lumped together. In India illegal omissions are equated with acts. If A, a nurse, being bound to feed a helpless invalid deliberately withholds food, knowing that the result will probably be death, that is murder. If she knows only that death is likely, then it is culpable homicide. If she is merely negligent or rash, then it is 'causing death by a rash or negligent act'.

The Indian law, in fact, both for acts and illegal omissions, has a triple set-up as opposed to the dual set-up of English law. Whether this is desirable depends on whether it is desirable to draw fine distinctions in dealing with questions of the mental element in crime, and we submit that it is desirable in order that punishment may be more accurately assessed. Rashness and negligence are nowhere defined in the Code, but there are two definitions of these terms by great judges which are universally accepted as classic; by Holloway, J., in *Nidamarti's Case,*[16] and by Straight, J., in *Idu Beg's Case.*[17] Nor is there in practice any real difficulty about the general definition of culpable homicide. It is not possible to commit the offence of culpable homicide by mere rashness or negligence: in all cases there must be either intent to cause death or knowledge that death is likely. But the Indian definition of murder ((b), (c), (d) of our comparative table above) is universally admitted to be too complicated. In an extreme case the Court may be called upon to find (see the words underlined in (d) above) whether the mind of the accused contained the *certainty* of a present *risk* of a *probability* of a *likelihood.* This is unduly complicated, but it is at any rate better than the gross fictions of English law already discussed.

Two attempts have been made to simplify the tangle of

[16] (1872) 7 M.H.C. 119, 120.
[17] (1881) 3 All. 766, 780.

Indian law—one in Burma, which it is submitted is no clearer on this point[18] than the law which it supersedes, the other in the Sudan Penal Code (based on that of India), where Section 248, defining murder, runs as follows:—

> [Subject to the statutory exceptions (see below)] 'culpable homicide is murder
>
> (a) if the act by which the death is caused is done with the intention of causing death
>
> *or* (b) if the doer of the act knew or had reason to know that death would be a probable and not only a likely consequence of the act or of any bodily injury which the act was intended to cause'.

Although of course there is obviously room for differences of opinion as to the point at which likelihood is strong enough to amount to probability, this definition is, it is submitted, preferable alike to the English and Indian definitions; it might perhaps be improved by an explanation to the effect that, without prejudice to the generality of the definition, death was a probable result wherever it ensued from an attack with a lethal weapon.

We turn to the list of exceptions which, if established by the accused, reduce what would otherwise be murder to manslaughter (or culpable homicide not amounting to murder). These are as follows:—

ENGLAND	INDIA
1. Grave and sudden Provocation.	1. Grave and sudden Provocation.
———	2. Exceeding *in good faith* the right of private defence of person or property.
———	3. Excessive zeal in discharging *in good faith* a public duty with excessive severity or by mistaken means.
[Sudden quarrel in the heat of passion is subsumed under the general head of grave and sudden provocation.]	4. Sudden quarrel in the heat of passion.
———	5. The free consent of the victim (who must be legally capable of giving such consent not *e.g.* a minor or a lunatic) to death or the risk of death.

[18] But see below.

There is only one such exception, therefore, in English law: in Indian law there are five. Of these, however, Nos. 2 and 3 are of very little importance since the keywords are '*in good faith*'; and cases in which the accused has acted in good faith (which includes due care and attention) and yet has exceeded his powers must obviously be rare. Any judge or jury would usually prefer to give him the benefit of the doubt and acquit altogether. There appears to be no reported case in India, though *Ensign Maxwell's Case,*[19] of which the *ratio decidendi* is somewhat obscure, may be such a case in Scotland. The other exceptions require more detailed consideration. The Code attempts to ensure that the Court should always have a discretion as to what constitutes grave and sudden provocation by reference to the facts of the particular case and should not be circumscribed by judicial precedent. This attempt took the form of enacting that what constitutes grave and sudden provocation is in all cases a question of fact. But the appetite for judicial rulings was not to be so easily balked. In England there is even apparent judicial authority for the view that the only case within this exception is where one of two spouses unexpectedly finds the other in the act of adultery and immediately kills one or both of the guilty couple; see *Holmes* v. *Director of Public Prosecutions,*[20] and though in that case Lord Simon did not intend to carry restriction of the doctrine so far, he did undoubtedly intend (and this is the general tendency of reported cases, both in England and India) to limit rather than to enlarge this exception. On the other hand, the instinct of juries has been increasingly, and it is submitted rightly, in favour of the lesser verdict, manslaughter, in all cases where the provocation, though not technically grave or sudden, is substantial. Judging by cases reported in the daily press this attitude of juries meets with a good deal of sympathy from the Bench.

The modern English textbooks, departing in this respect from the express authority of Blackstone,[21] treat 'sudden quarrel in the heat of passion' as merely a special case of 'grave and sudden provocation' and the gradual delimitation of the general heading has practically had the effect of abolishing the special case: see

[19] (1809) Buchanan, Part 2, p. 3.
[20] [1946] A.C. 588 at p. 598.
[21] *Commentaries,* Vol. 4, Chap. 14, p. 190.

Mancini v. *Director of Public Prosecutions*[22] and *R.* v. *Semini*.[23] In India, however, the exception is a separate one. The Scottish textbooks (Burnett and Alison in particular) appear to be contradictory.[24] The writers themselves share the accepted English view: but they quote in support a *dictum* of Cicero[25] which appears rather to treat grave and sudden provocation as a special case of sudden quarrel.

'*In omni injustitia permultum interest utrum perturbatione aliqua animi quae plerumque brevis est et ad tempus an consulto et cogitato fiat injuria: leviora enim sunt ea quae repentino aliquo motu accidunt quam quae meditata et praeparata inferuntur*'. It is respectfully submitted that Cicero's view embodies both humanity and common sense.

The exception 'consent of the victim' requires to be seen in historical perspective. In the old duelling days it was perhaps necessary to deal sternly with all such cases, though even then there was a great difference between the professional swashbuckler and bully and the peaceful gentleman who found himself compelled to fight on a point of honour. In at least two cases of the latter kind Scottish juries found only culpable homicide. For India, Macaulay in the Note M to the Draft Code gives convincing grounds for the exception. At the present day the commonest case is that of 'mercy killing', and the overwhelming sense of the majority of English people is that such cases do not deserve the death penalty, nor even the life sentence.

Stephen, in discussing the unique case of *Dudley and Stephens*,[26] says that '. . . an error on the side of severity is an error on the safe side'. The context shows that by this otherwise startling remark he meant nothing more Draconian than that hard cases should not be allowed to make bad law. The

[22] [1942] A.C. 1.

[23] [1949] 1 All E.R. 233. Both these cases would have been murder in India, since, although they were cases of sudden quarrel, the accused was shown to have taken an unfair advantage. They would probably have received the life sentence.

[24] The writer takes this opportunity of correcting an overstatement made by him in *Jeremy Bentham and the Law*, p. 229. The difference between English and Scots Courts in these questions was not in legal principle but that the Scottish judges were in general inclined to allow juries a wider discretion than the older generation of English judges would have approved in the application of the law to the particular facts of each case.

[25] They do not give the reference.

[26] (1884), 14 Q.B.D. 273.

converse is equally true, a law which inevitably makes hard cases is a bad law and ought to be reformed.

When all the dead wood is cut away from our definitions of murder and manslaughter, and every exception is allowed which is capable of accurate definition, there will still remain a very wide difference of culpability between different types of murder. This raises two questions:—

(a) whether any attempt should be made to distinguish between murder in the first degree for which the penalty should normally be death, and murder in the second degree for which it should normally be the life sentence or some lesser penalty.

(b) whether, either apart from or in addition to such a distinction, the judge and jury, or the judge after the verdict should have a discretion as to the sentence to be imposed.

The two attempts which were made in the course of the parliamentary discussions last year to establish a distinction between two classes of murder were subjected to very damaging criticism; and the difficulties of establishing such a distinction are obviously great. Nevertheless the advantage of having it is obvious. It is with considerable diffidence that the writer ventures to put forward the following [27] as a basis for discussion.

'Murder in the first degree includes:—

1. All cases of repeated murder—whether the accused has actually been convicted of one murder before another is committed or not.
2. All cases of murder for financial or economic gain.
3. All cases of torture or the deliberate infliction of a slow or painful death by whatever means'.

To these might perhaps be added, though they are more controversial:—

4. All cases where the victim was intentionally killed in the perpetration by the accused of a criminal object—*e.g.*, rape—

[27] The Burma amendments include in the first degree all cases of 'premeditated' killing. In view of the likeness between 'premeditated' and 'aforethought' and the history of the latter word, there is a danger that this might be interpreted in a sense its authors presumably did not intend. The proposal deserves consideration, though it might place a somewhat larger number of murders in the first degree than is here proposed. (Burma has always been a country with a very high murder rate.)

5. Or was intentionally killed in order to destroy evidence of the accomplishment of a criminal (? unlawful or ? even an immoral) purpose.
6. All cases where a person, whether official or not was killed in the performance of a public duty or to prevent his performing a public duty or as an act of revenge on him for having performed it.
7. All cases where one person is killed for the effect which such killing may have on another: *e.g.,* killing a son as an act of revenge against his father. Such cases are almost unknown in England, but they do from time to time occur in countries whose law is largely based on English ideas.

But whether it be found possible to institute such a distinction or not, the case for giving the judge, or the judge and jury, a discretion as to penalties is overwhelming. If it is found possible to divide murder into two categories, there should still be such a discretion on proof of extenuating circumstances to impose the life sentence for murder in the first degree and a sentence less than life for murder in the second degree.

Judges in India have had a discretion to impose either the death sentence or the life sentence for murder at least since the Penal Code became law nearly ninety years ago: and though, *experto crede,* the decision is sometimes a difficult and painful one to make, no judge or penal settlement officer of experience would willingly contemplate its abolition. Murder on the scale that was committed by Tantia Bhil,[28] with a reputed 'bag' of over fifty victims before he was brought to book, or of others within the present writer's experience with anything up to twenty victims or more, murder that is to say which has become a profession, or murder committed in circumstances of exceptional depravity, normally landed its perpetrator at the gallows and not the Andamans. But of those who receive the lesser sentence a large proportion are fundamentally decent folk who have committed an exceptional crime under exceptional stress. The writer has personally met at any rate one such man, a convict emeritus so to speak, who on return from transportation was restored to his office as a village *patwari* and enjoyed the confidence of

[28] Or rather dacoity with murder. The Indian law of collective crimes is outside our present scope.

government and the esteem of his neighbours; and the late G. W. Stevens, the journalist, referring to the fact that Andaman Islands officials were allowed to choose free servants from among the better-behaved convicts, asserts, and gives reasons for the assertion, that the murderer was found to make an excellent children's nurse.

It is difficult to understand what considerations can have led the Colonial Office in most of its criminal codes, whether based on the Indian Penal Code or not, to deprive its judges of this salutary discretion. No one would suggest that the Home Secretary or the Colonial Governor should be deprived of the power to grant a reprieve: but that should be a reserve power for exceptional cases. For the day-to-day task of assessing what is the suitable punishment in the circumstances of each individual case, the Home Secretary or the Colonial Governor is not the best, but the worst possible tribunal; worst because he is not really a tribunal at all but an administrative officer, working by the usual methods and channels of administration, worst because his own proper responsibilities are heavy enough to make it impossible for him to devote adequate time to each case without neglecting duties which he is better fitted to discharge, worst above all because his proceedings (except so far as he himself chooses to lift the veil) are conducted in secret. Doubtless he frequently consults the trial judge but he is under no obligation to do so, and the correspondence between them is confidential. It is even held that he is not open to challenge in Parliament for the advice which he may give the King. But what right can he have to advise the King at all except in the exercise of his responsibility to Parliament? The only possible answer to this question is that he is exercising a judicial function. But judicial functions should be exercised in public by trained judges so that justice may not only be done but be seen to be done: and the prerogative of mercy is primarily a judicial function.

We have said that for a judge in India the discharge of this duty of assessing the correct penalty (even within the limits which Indian law allows) is sometimes difficult and painful. But mechanically to pronounce the extreme sentence in all cases and leave it to some extra-judicial personage to decide whether it should be carried out would, one would think, be still more distasteful to that human sympathy without which judicial

functions are hardly likely to be exercised as they should be. And in England a judge need seldom or never suffer from the principal difficulty which besets Indian judges in this matter. The machinery for the exercise of judicial discretion in England in matters of punishment is well developed, and nothing is more to the credit of British judicial administration than the informal proceeding which takes place in Court after the verdict, when in order to enable the judge to arrive at a correct sentence the whole of the prisoner's life is brought under review. Not merely defence, but prosecution and even investigating officers make a point of bringing to notice not only the points against but anything that can be said in favour of the accused. Would we had had such a procedure and such a spirit animating it in India thirty years ago! Why should it not be possible in regard to the one crime above all others in which the degrees of moral turpitude and the chances of reclamation vary most widely?

And, finally, in favour of conferring such a discretion openly on the judges is the fact that indirectly juries sometimes with at least the tacit approval of judges (including some of the most distinguished) are already exercising it. Let us conclude with two instances among many which could be given.

In 1924 a young Oxfordshire labourer was tried before Mr. Justice Roche (as he then was) for the murder of his sweetheart, the niece and adopted daughter of the farmer who employed him. The young couple believed (rightly or wrongly) that there was no possibility of a happy future for their love. It may be also (for the man had an uncouth poetic strain in him) that something of the spirit to be found in Browning's *Porphyria's Lover* worked in his mind. There was no suggestion of a quarrel; but after what seems to have been a hopeless evening together in mid-winter he strangled her, hid her body in a ditch and at once walked straight into Oxford, nine miles in darkness and pouring rain, to give himself up to the police for murder. This was clearly murder; and, since there was no doubt as to the facts and (if the murder verdict were returned) no option as to sentence, evidence of character was strictly irrelevant. Nevertheless, such evidence was freely admitted: and one onlooker at least will never forget the thrill which ran through the Court when the heart-broken uncle (giving his evidence with great emotional difficulty) was asked the direct

question, 'You have employed the prisoner: what about the prisoner's character?' He pulled himself together and answered in a firm voice, 'Apart from this case, I never want to meet a better lad'. The jury returned a verdict of manslaughter, and it is doing Lord Roche no injustice to say that he practically invited them to take a lenient view. A heavy sentence was of course inevitable: but it fell far short of the maximum sentence for manslaughter.

On October 18, 1927 a man was tried at the Berkshire Assizes for murder. He had been savagely attacked by the deceased, a much more powerful man than himself; and, suffering from multiple injuries and loss of blood, had staggered into his garden hut nearby. Several minutes later, being partly recovered, he picked up from there a humane killer (a tool of his trade as a pork butcher), and went in chase of his enemy whom he shot dead from behind from a distance of about ten yards. An old-fashioned judge on these facts would perhaps have advised the jury that injury of this sort was not in law grave provocation; that in view of the interval of time which had elapsed it could no longer be regarded as sudden, and that the act must be treated as one of revenge. Mr. Justice Sankey, however (rightly, it is submitted), spoke of the provocation as 'appalling' and said nothing about the delay. The verdict of manslaughter being returned, he expressed his agreement; and taking into consideration the undesirability of sentencing a man of good standing and reputation to associate with habitual offenders pronounced a sentence of six months in the second division.

In conclusion the writer is conscious that his proposals will probably come under fire from both sides; the abolitionists will not be satisfied with a reform which does not go the full length which they so earnestly desire; those who refuse to believe that there is anything wrong with our law will probably take fright at any suggestion that the law should be made more humane, even to the extent that to do so would be merely to recognise existing practice. Of death sentences imposed today in England only about half are actually carried out: of cases where the jury bring in a verdict of manslaughter (and indeed in one famous case, about thirty years ago, of acquittal), though on the strict letter of the law a verdict of murder would have been inevitable, there

are no statistics. But the proposals which are here put forward are in no sense a compromise between two extremes; they are an attempt to make the law more moral, more logical and more humane: and a fairly close study of the opinions of the Law Lords who spoke in the recent parliamentary debates, as also of jury cases reported from time to time in the public press, leads to the belief that they represent a large body of informed opinion.

Cases which illustrate the need for the reforms herein advocated are frequent: but one which has attracted public attention since this paper was written may perhaps be mentioned. A nineteen-year-old girl-wife was tried for the murder of her husband: the defence was provocation; and the judge, while stressing the provocation stressed also the narrow sense which the law attaches to the words 'grave and sudden'. In such cases, as we have said, it is not unusual for the jury to take a more lenient view than a strict adherence to the letter of the law would allow. But this jury, with the comfortable feeling that in view of the youth, sex, and provocation of the prisoner there was no prospect of the gallows, returned a verdict of murder coupled with a strong recommendation to mercy. The judge accordingly had no option but to pronounce the death sentence. From this point till the reprieve, although everybody concerned including the Home Secretary acted with commendable promptitude, a period of five weeks elapsed; and an enormous amount of public and private time and energy was wasted.

A monster petition was organised by the solicitor for the defence and over 12,000 signatures obtained; three judges with the aid of counsel solemnly considered and rejected a *pro forma* appeal; and some part of the time of a busy Home Secretary and his office and presumably also of a busy Monarch was taken up: all this to do what could have been better done within five minutes of the verdict by the trial judge, if he had the legal power which should have been his. Moreover, the prospect of a definite date of release (which can always be advanced if necessary) is (it is submitted) psychologically preferable in such cases to an indefinite reprieve.

for the preservation of the peace. But certain it is that ever since the days of Henry II and the Assize of Novel Disseisin, English law has lent the weight of its authority to the person in possession. It has done so in two ways. It has given him a remedy against those who disturb his possession—the great remedy of trespass and its offshoots—and, by limiting the right of recaption severely, it has ensured that counter-claimants must proceed against him by due process of law. So that, as a general rule, if the possessor is not also the owner, he can nevertheless keep the thing until such time as the true owner proves his title to it, and in any event he has a complete protection as against third parties. And the highly individualistic common law in England pays equal regard to the protection of property rights. One has only got to read such cases as *R.* v. *Hussey*[6] and to study the history of the offences of burglary and arson to appreciate that at common law there is much truth in the saying that 'an Englishman's home is his castle'; and his chattels are equally well protected by other branches of the criminal law.[7]

Bearing in mind, then, these inter-relating objects of the law, namely, the protection of possession and the protection of property rights, let us proceed to analyse the problem of finding, and see how far achievement has kept pace with the fulfilment of this purpose.

Now I think that, on analysis, you will see that cases on finding are divisible into two types[8]:—

(a) Those in which only two parties are involved, conveniently called two-party cases, and

(b) Those in which more than two parties are concerned, conveniently called three-party cases.

Let us look at each of these types in turn.

(A) TWO-PARTY CASES: OWNER *versus* FINDER

These cases may take a variety of forms, but it will be sufficient for our purpose to mention the chief. First it may be that the contest is between the true owner and the finder. Here there can be no doubt that both the criminal and the civil law support

[6] (1925) 41 T.L.R. 205.

[7] *e.g.* Larceny Act, 1916, 6 & 7 Geo. 5, c. 50; Malicious Damage Act, 1861, 24 & 25 Vict., c. 97.

[8] See Riesman, *Possession and the Law of Finders*, 52 *Harvard Law Review*, p. 1105.

the owner. As far as the criminal law is concerned, the provisions of the Larceny Act, 1916[9] are adequate protection. If the finder believes that by taking reasonable steps he can trace the true owner, and nevertheless at the very time of finding decides to appropriate the property, he will be guilty of larceny. And at civil law there is no doubt that the true owner would succeed in a suit against the finder. But there are difficulties with regard to the statutes of limitation. An example may clarify this. A finds a jewel in the street. He makes all reasonable inquiries, but no claimant comes forward. He accordingly keeps the jewel for six years. Then B comes forward with conclusive proof that the jewel is his. When does the period of limitation begin to run? If from the date of finding, B's action is barred. If from the date of B's demand for the ring and A's refusal to hand it over, then A will lose in spite of his six year's enjoyment. If the latter is correct,[10] then you will see how far English law goes towards the protection of property rights.

It may be questioned whether it does not go too far, especially when comparison is made with Continental law, according to which if the finder has publicised his find, he gets title by affirmative prescription after the passage of a certain time.[11] There are other problems, which, as far as I know, have not come up for decision, problems of compensation for work done on the thing found. For example, A in the case given above has the jewel polished, and along with other jewels of his own made into a ring. Here some help might be derived from the Roman law of *accessio* and *specificatio* and its Continental derivatives.

But two-party cases are not limited to owner versus finder. Thus the owner may not be a contestant at all either because after due advertisement he fails to appear,[12] or because owing to the nature of the thing found,[13] or the nature of the place in which it is found,[14] it is impossible to trace him. In

[9] 6 & 7 Geo. 5, c. 50, s. 1 (2) (i) (d).

[10] Cf. *Spackman* v. *Foster* (1883), 11 Q.B.D. 99. *Quære* if B would be equally successful if A had sold the jewel to X, and six years having elapsed, X pleaded that his purchase was as against B a wrongful act amounting to conversion which would give an immediate cause of action.

[11] See Huebner, *A History of Germanic Private Law* (Philbrick, trans. 1918), pp. 428–430.

[12] *Bridges* v. *Hawkesworth* (1851), 21 L.J.Q.B. 75; 15 Jur. 1079.

[13] *Elwes* v. *Brigg Gas Co.* (1886), 33 Ch.D. 562.

[14] *Button 'B' Pennies* in *The Solicitor*, Vol. 14, No. 3, March 1947, p. 50.

these cases, therefore, the original owner being unascertainable, the parties to the contest may be either finder and stranger, or finder and occupier.

FINDER *versus* STRANGER

The classic example of this type of case is *Armory* v. *Delamirie*,[15] where a chimney-sweep's boy found a jewel in a chimney and took it to a jeweller to have it valued. The jeweller refused to hand it back to the boy who sued for damages and succeeded on the ground that it was sufficiently in his possession to enable him to maintain the action of trover, to which a defendant is not allowed to plead *jus tertii*. It should be noted (1) that no claim to the jewel was made by the occupier of the house in which the jewel was found [16] and (2) that apparently the original owner was untraceable—hence no larceny.

FINDER *versus* OCCUPIER

But sometimes the occupier does make a claim to the thing found on his property. Thus in *Bridges* v. *Hawkesworth* [17] a travelling salesman found a bundle of notes on the floor of a shop. He handed them over to the shop-owner for the purpose of advertising for the true owner. The true owner was never traced. It was held that the finder was entitled as against the occupier. That is the bare decision; and, for the purpose of a better analysis of the various finder-situations, the following points should be made.

(1) Due inquiries had been made for the true owner—hence the criminal law had no part to play.

(2) The disappearance of the true owner left the civil law directionless. Its primary object, namely the protection of property rights could not be fulfilled.

The English Court solved the problem within the framework of the forms of action in the following manner:—

(1) Only a possessor can bring trespass.

(2) The question is, therefore, who has possession?

[15] (1721), 1 Strange 505.

[16] See *Hannah* v. *Peel*, [1945] K.B. 509 where the occupier did make a claim but failed. Professor Winfield thinks his failure due to the fact that he had never been in possession of the house; 61 *Law Quarterly Review*, p. 334; *contra* Megarry, *The Conveyancer's Year Book*, 1946, p. 53.

[17] (1851), 21 L.J.Q.B. 75; 15 Jur. 1079.

(3) The occupier of property does not automatically possess everything lying unattached on that property.
(4) In this case he did not know that the notes were there.
(5) Because of (3) and (4) the finder was the first to get possession, and he, therefore, had the better possessory title.

It is significant that no reference was made to Roman law where, at least in the case of treasure trove, the property would have been shared between the finder and the occupier.[18] But we must not forget that English law was and still is[19] to some extent fettered by the forms of action, and possession is the very core of trespass.

To sum up the discussion on the two-party cases :—

(1) If the owner is a party in the contest his title will prevail over that of the finder at civil law; and his property rights derive further protection from the criminal law.
(2) If the owner is unascertainable, after due inquiry has been made, the criminal law generally has no part to play. Here, according to English civil law, the finder will prevail over a stranger,[20] and over the occupier when the thing found was not attached to the occupier's land.[21] He will not prevail over the occupier where the thing found is embedded in or otherwise attached to the occupier's land.[22]

(B) THREE-PARTY CASES

Let us turn now to what we have called the three-party cases. Here there are three parties interested in the thing found—the owner, the occupier and the finder.

The owner is very much in the picture either because (1) no inquiry has been made for him or (2) sufficient time has not elapsed between the inquiry and the date of the dispute to justify an assumption that he cannot be traced. The interest of the occupier is derived from the fact of his occupation and that of the finder from the fact of finding. Here it is the purpose of the

[18] See Buckland, *Text-Book of Roman Law*, § 80.
[19] See *Hamps* v. *Darby*, [1948] 2 All E.R. 474.
[20] *Armory* v. *Delamirie* (1721) 1 Strange 505.
[21] *Bridges* v. *Hawkesworth* (1851), 21 L.J.Q.B. 75; *Hannah* v. *Peel*, [1945] K.B. 509.
[22] *South Staffordshire Waterworks* v. *Sharman*, [1896] 2 Q.B. 44; *Elwes* v. *Brigg Gas Co.* (1886), 33 Ch.D. 562.

criminal law to punish any misappropriation during the continuance of any uncertainty about the claim of the true owner, while it is the function of the civil law to settle the possessory title of the other two parties.

You will see that this case is really a variation of *Bridges* v. *Hawkesworth*.[23] You will remember that, in that case, the true owner was not a party to the conflict because of the fact of the advertisement, the passage of time and his failure to appear. Here, of course, there is either no advertisement or an insufficient passage of time. I think there can be no doubt that, in these circumstances, if either the occupier or the finder appropriate the thing found, he will be guilty of larceny, according to the provisions of the Larceny Act, 1916,[24] unless the article found is such that from its very nature it is incapable of being traced to its true owner, *e.g.*, banknotes, shillings, etc. found in the street. But what about the question of the 'interim' possession of the article until such time as the true owner appears, or can be presumed to be unascertainable? In the conditions of modern life, this is a most important question. People invariably lose things in trains, in buses and in shops. Now if the lost article is found by a servant of the railway company or omnibus company or of the shop, he will usually be required by the terms of his contract to hand it over for safe-keeping.[25] But suppose that it is found by another passenger or another customer, what is the position? He must, subject to the qualification mentioned above, undoubtedly make all reasonable efforts to trace the true owner; otherwise he may incur the penalties of the criminal law, but the vital question remains 'who is to have the keeping of the thing during the continuance of those inquiries'? It is submitted that the occupier of the *locus in quo* should have for the following reasons.

(1) The true owner is more likely to retrace his steps, so to speak, from railway to bus to shop than he is to read any advertisement which the finder may insert in any one of a number of newspapers.

[23] (1851), 21 L.J.Q.B. 75.
[24] 6 & 7 Geo. 5, c. 50, s. 1 (2) (i) (d).
[25] See *South Staffordshire Waterworks* v. *Sharman*, [1896] 2 Q.B. 44 and Birkett, J's observations thereon in *Hannah* v. *Peel*, [1945] K.B. 509, 512 approving Salmond's view (*Jurisprudence*, 9th ed., p. 383) that a servant who finds in the course of his employment finds for the master.

(2) The safe-keeping of the article from appropriation is perhaps more likely to be achieved in the hands of the occupier.

Nor do I think the difficulty of interim possession insoluble; it could easily be done, by a liberal interpretation of the Larceny Act, 1916,[26] by making every finder hand over the thing found to the occupier, *viz.* by saying that this was the reasonable course to take in attempting to trace the true owner. If the thing were found in the street, the police are the obvious depositories. It is interesting to note that in *Bridges* v. *Hawkesworth*[27] the finder voluntarily handed over the bundle of notes to the occupier for the purpose of advertising for the true owner, and that in *Hannah* v. *Peel*[28] the soldier handed the brooch to the police for the same purpose. But there does not seem to be any common law rule governing the matter of interim possession. One is permitted to wonder if this is the reason why in English law there is so little authority on the outstanding question of the finder's right as against the occupier.

One can easily see that occupiers will be unwilling to take steps to secure the custody of an article from the finder, unless there is some rule giving them the right to do so. They fear the implications of assault and false imprisonment. The net result is that the connection between the true owner and the article becomes more difficult to trace, the finder has a greater opportunity to appropriate it, and the occupier if he wishes to dispute the title of the finder must be the plaintiff in the action, which is in the nature of things unlikely, particularly if the article has very little value.[29] No wonder *Bridges* v. *Hawkesworth*[30] and *Hannah* v. *Peel*[31] are separated by almost a century.

To sum up the discussion on three-party cases:—

(1) The criminal law ensures as far as possible that inquiries should be made for the true owner.

(2) During the continuance of these inquiries the finder is entitled at common law to keep the thing.

[26] 6 & 7 Geo. 5, c. 50, s. 1 (2) (i) (d).
[27] (1851), 21 L.J.Q.B. 75.
[28] [1945] K.B. 509.
[29] See interesting table compiled by Riesman in 52 *Harvard Law Review*, pp. 1128–1129. It consists of replies from the Lost Property Departments of Big Stores in U.S.A.
[30] (1851), 21 L.J.Q.B. 75.
[31] [1945] K.B. 509.

(3) The question of interim possession in the law of finding is perhaps its most unsatisfactory aspect. The common law rule does not assist the discovery of the true owner. It might even facilitate his non-discovery.

THE PRAGMATIC APPROACH OF ENGLISH LAW TO THE PROBLEM OF FINDING

Enough has been said about the various types of finder-situations to make it clear that they all depend ultimately on the fact of possession. The criminal law will punish a dishonest, the civil law will protect an honest acquisition of possession. The problem of possession, therefore, becomes of the utmost importance.

It is suggested, however, that the approach of English law to the problem has been, and still is, essentially pragmatic, that is to say, that in cases on possession it is very difficult to find any general principles unless those principles are stated in the very widest terms. I make this suggestion with some timidity; I am not unmindful of Lord Justice Denning's tribute to Professor Winfield's *Textbook on the Law of Tort*.[32] 'The reason why such books are so useful in the courts is that they are not digests of cases, but repositories of principles. The vast tomes written and edited by practitioners fulfil a different purpose. They are valuable as works of reference. They are cited not for principles, but for detailed rules on special subjects. They are most important in day to day practice, but do not compare with books such as Winfield, when it comes to fundamental principles'.

I am, however, fortified in my submission by the fact that though lawyers agree that for possession to exist the would-be possessor must have, with regard to the object concerned both the *corpus possessionis* and the *animus possidendi,* yet there is great difference of opinion as to the degree of physical control which satisfies the *corpus* element, and as to the width of the intent which satisfies the *animus* element. It is submitted that when a question of possession is in issue, all that can safely be said is that both the *corpus* and *animus* elements must exist, but this is a general principle in the very widest terms. It is possible to state it more narrowly, as indeed all writers on

[32] 63 *Law Quarterly Review,* p. 516.

jurisprudence have attempted to do,[33] but only at the cost of ignoring some or other of the cases. Thus in dealing with the *corpus* element it is impossible to reconcile the statement that 'taking physical control of an enveloping object implies also the acquisition of physical control over the objects it encloses. So where a man enjoys the *corpus* element in respect of a house he also exercises the *corpus* element in relation to its contents,[34] with the decision in *R.* v. *Hudson*[35] where a person named Hudson received an envelope which in error was addressed to him but was really meant for a Mr. Hutson living in the same street. After a few days he opened the envelope and discovered a cheque which he converted. He was held guilty of larceny on the ground that he did not get possession of the cheque until he opened the envelope and discovered its contents.[36] But as the learned editor of *Salmond* has pointed out,[37] he must have realised when he received the envelope that it contained some piece of paper, and the exact nature of the paper was immaterial.

Again in *Merry* v. *Green*[38] where a man who bought a bureau at an auction, and later found money in a secret drawer and appropriated it, was convicted of larceny on the ground that he did not possess the money until he discovered it, and that he formed the *animus furandi* simultaneously with his acquisition of possession, no explanation was offered of how the vendor had possession, since he was also ignorant of the secret drawer; and as larceny is an offence against possession this would seem to have been material. Perhaps the explanation is that it is possible to commit larceny from some person or persons unknown.[39] But unless limits are placed upon this, it may well revolutionise the whole of the law of larceny. For it will no longer be necessary to prove that a particular identifiable victim had possession and that the prisoner unlawfully and dishonestly interfered with that possession. It will be sufficient merely to prove that the prisoner

[33] English lawyers have as much trouble with the 'homing pigeon' as Roman Law had with the fugitive slave. Neither fits easily into a pre-arranged scheme of possession. See *Hamps* v. *Darby*, [1948] 2 All E.R. 474.

[34] Keeton, *Jurisprudence* (2nd ed.), p. 182.

[35] [1943] K.B. 458.

[36] *Contra R.* v. *Mucklow* (1829), 1 Moody C.C. 160.

[37] *Jurisprudence* (10th ed.), p. 293.

[38] (1841), 7 M. & W. 623.

[39] See Goddard, L.C.J., in *Hibbert* v. *McKiernan*, [1948] 1 All E.R. 860.

acquired possession and at the same time formed the dishonest intent—which is not the same thing. This point will be dealt with later in considering *Hibbert* v. *McKiernan*.[40]

Again in *R.* v. *Harding*,[41] where a person was convicted of robbery from a servant of her master's goods, the property (which in the law of larceny means the possession)[42] in the goods was held to be correctly laid in the servant. Yet one of the first things we learn in the law of larceny is that a servant has *detentio* or custody but not possession of his master's goods. So that it becomes necessary to say that if the servant appropriates the master's goods he is guilty of larceny, the possession being in the master until the appropriation; but if a stranger takes the goods from the servant the stranger is likewise guilty of larceny, the possession being in the servant for this purpose.

This patent inconsistency can only be explained by saying that the concept of possession in English law is a flexible one, and it will be bent, according to the individual merits of the case, to ensure the protection of property rights.

Or contrast *R.* v. *Rowe*[43] with *Bridges* v. *Hawkesworth*.[44] In *R.* v. *Rowe* A owned a canal. Iron was dropped from a barge into the canal, unknown to A. During the cleaning of the canal B, a stranger, removed the iron and it was held that the canal company could prosecute him for larceny, as the iron had been in their possession. But in *Bridges* v. *Hawkesworth* A owned a shop. A bundle of notes was dropped on the floor of the shop unknown to A. B, a travelling salesman, picked it up. Far from being guilty of larceny B was held to be entitled to keep the notes, as they had never been in the possession of A. Now there are two methods of reconciling these cases: (1) In *R.* v. *Rowe* the iron was embedded in the canal; hence within the decisions of *South Staffordshire Waterworks* v. *Sharman*[45] and *Elwes* v. *Brigg Gas Co.*[46] possession vested in the occupier. In *Bridges* v. *Hawkesworth* the bundle was lying unattached; hence

[40] [1948] 1 All E.R. 860.
[41] (1929), 21 Cr. App. R. 166.
[42] See Pollock and Wright, *Possession in the Common Law*, p. 139.
[43] (1859), Bell C.C. 93.
[44] (1851), 21 L.J.Q.B. 75.
[45] [1896] 2 Q.B. 44.
[46] (1886), 33 Ch.D. 562. It appears, however, that there was no evidence for this, and the case was not decided on this ground. See *Hibbert* v. *McKiernan*, [1948] 1 All E.R. 860, 862.

possession did not vest in the occupier, as was also decided in *Hannah* v. *Peel*.[47] (2) In *R.* v. *Rowe* the finder was a trespasser, and one case in which a finder obtains no title is that in which he gets possession only through a trespass or other act of wrongdoing.[48] In *Bridges* v. *Hawkesworth* the travelling salesman was not a trespasser.

But though it is easy to reconcile the cases, the contrast shows that the issue of possession or no possession is solved not merely by authority but also on the merits of the case. Perhaps the conflict in the cases on possession has a really salutary effect, for by a process of distinguishing without disapproving, the judges are enabled to do justice according to law between the parties. They purport to follow the law, which in this connection means decided cases, but the state of the authorities is such that they are able to depart from authority, at the same time giving the impression of following it. They possibly leave inconsistencies in their trail; nevertheless it is suggested that they present an overall picture of consistency. Those who seek a coherent theory of possession must not forget the purpose which the law sets out to fulfil. They may achieve the one, but only at the cost of destroying the other.

AN OUTLINE OF THE DIFFICULTIES ATTACHING TO (A) THE 'FINDING-IS-KEEPING' (B) THE 'FINDING-IS-STEALING' CONCEPTS

It now remains to discuss some of the difficulties attaching to (a) the 'finding-is-keeping' and (b) the 'finding-is-stealing' concepts, and in particular to examine the recent cases of the *Button 'B' Pennies*[49] and *Hibbert* v. *McKiernan*.[50]

(A) THE 'FINDING-IS-KEEPING' CONCEPT

From the standpoint of the civil law enough has been said to show that as a general rule the finder prevails against all but the true owner except in cases where the occupier has acquired a prior possession by virtue of the thing being embedded in or otherwise attached to his land. Whether the occupier gets a prior possession in other cases cannot be said to be finally settled.

[47] [1945] K.B. 509.
[48] Salmond, *Jurisprudence* (9th ed.), p. 384. See also *Hibbert* v. *McKiernan*, [1948] 1 All E.R. 860.
[49] *The Solicitor*, Vol. 14, No. 3, March 1947, p. 50.
[50] [1948] 1 All E.R. 860.

It has been shown that the law attaches far more importance to the fact of possession than to the act of finding, and inevitably so, since the finder's remedy must ultimately be brought within the framework of trespass, and trespass is an interference with possession.

It has been suggested that the English law concept of possession is at once pragmatic and flexible with the salutary result that many of the finder-cases are decided on their merits. It may be questioned, however, whether this pragmatic flexibility is enough to remove all the difficulties. It is suggested that at least two difficulties remain, one of which can be solved quite easily without in any way interfering with the English law emphasis on possession, whereas the other would necessarily result in some modification of it. The difficulties are, first the question of interim possession in three-party cases, to which reference has already been made, and second, the question of the ultimate distribution of the property in the thing found between the parties interested in it. With regard to the first difficulty it has been indicated that if the thing is found in the street, it should be handed over to the police for the purpose of tracing the true owner. It has been suggested that if it is found elsewhere in shops, buses, trains, public parks, etc., it should be handed over to the occupiers for the same purpose. This suggestion may be open to objection on the ground that if it is based on the assumption that the occupier is less likely than the finder to appropriate it during the continuance of inquiries for the true owner, it is not proved, and if it is based on the assumption that it will facilitate the discovery of the true owner, the police are more likely to achieve this object. These objections may be well taken, but it seems to matter little provided that the true object of these suggestions is achieved, namely the effective search for the true owner. It has been suggested that this object could easily be achieved within the existing law by a liberal interpretation of the Larceny Act[51] by requiring every finder to hand over the article found to the proper authority—whether it is the police in every case, or the occupier in some instances will depend on the validity of the objections taken above—as the reasonable steps which he must take to ascertain the true owner. If it is now too

[51] 6 & 7 Geo. 5, c. 50, s. 1 (2) (i) (d).

late so to interpret the section, an explanatory section would have to be added.[52]

The second difficulty involves the ultimate distribution of the property among the interested parties. It has been pointed out that where the true owner cannot be found after due inquiries have been made, English law is left directionless in assessing the respective claims of the occupier of the *locus in quo* and the finder of the article. It has been shown that the difficulty is solved by vesting the possessory title in the person who first acquired possession of the article, and it has been demonstrated that because of the flexible concept of possession in English law, the judges are able to do justice between the parties on the merits of the case. It may be questioned, however, whether the fact of possession is in itself sufficient to justify a preference for one claimant to the other. The ultimate choice between the claimants depends (1) upon the selection of those authorities which are to be followed, and (2) upon applying them to the facts and giving the favoured claimant the *whole* of the article found. It is suggested that the attitude of English law, by which the finder gets all or nothing, is unsatisfactory, and that a rule, such as that of Roman law in the case of treasure trove,[53] would be more satisfactory. There the finder shared with the occupier provided he found the thing by accident. It is submitted that only by adopting some such rule, will English law attach as much importance to the act of finding as it at present does to the fact of possession.

(b) THE 'FINDING-IS-STEALING' CONCEPT

The Larceny Act, 1916[54] defines 'taking' to include obtaining the possession by finding, where at the time of the finding the finder believes that the owner can be discovered by taking reasonable steps. The learned editor of *Stephen's Digest of the Criminal Law* has pointed out[55] that 'this enactment seems to

[52] The inaction of the common law with regard to the question of interim possession has to some extent been remedied by statute through the medium of the much-used statutory instrument. See *e.g.* London Hackney Carriage Act, 1853 (16 & 17 Vict., c. 33), s. 11; Metropolitan Public Carriage Act, 1869 (32 & 33 Vict., c. 115), s. 9 (5); Civil Aviation Act, 1946 (9 & 10 Geo. 6, c. 70), s. 45; Transport Act, 1947 (10 & 11 Geo. 6, c. 49), s. 119 (c). But the problem of interim possession where the thing is found in shops or other public places has still to be solved.

[53] Buckland, *Text-Book of Roman Law*, § 80.

[54] 6 & 7 Geo. 5, c. 50, s. 1 (2) (i) (d).

[55] Eighth edition by L. F. Sturge, p. 325, footnote 2.

cover completely, as it was no doubt intended that it should, all the case law on which the matter formerly depended. It is not necessary, therefore, to quote cases decided before 1916, and none have been decided since then'. The latter part of this statement, though true at the time when it was written, is no longer so, for since the appearance of the eighth edition of *Stephen*, two interesting cases on the criminal aspects of the problem of finding have arisen.

The first of these is the case of the *Button 'B' Pennies*.[56] The facts were as follows: the prisoner entered forty-two telephone booths in the course of two days for the purpose of pressing Button 'B' to recover coins left behind by persons who had attempted to telephone but failed to 'get through'. He was charged with larceny of the coins so obtained and convicted on the ground (1) that the insertion of the coins in the slot puts them into the possession of the Postmaster-General as bailee, and any unlawful interference with his possession constitutes larceny and (2) moreover, a person entering a telephone booth for such a purpose is a trespasser, and a trespasser does not acquire title by finding. That is the bare decision as extracted by the learned editor of *The Solicitor* from a brief report in *The Times* newspaper. The decision is undoubtedly correct, but it was perhaps unnecessary to rely upon the notion of a bailment to the Postmaster-General. The notion of bailment in criminal law is complicated by judicial interpretation of the section in the Larceny Act,[57] which punishes conversion by a bailee. *R.* v. *Hassall*[58] shows that the section only applies to those bailments under which it is the bailee's duty to deliver the identical article bailed and not merely an equivalent for it. This can hardly be said to be the case when unmarked pennies are inserted in a telephone-box. However, the tendency is to restrict rather than to enlarge the principle of this immunity,[59] and in any event it would seem that the section is intended to cover conversion *by* a bailee, and not conversion *from* a bailee. Nevertheless it is submitted that the notion of involuntary bailment was unnecessary for the decision which could have been reached

[56] *The Solicitor*, Vol. 14, No. 3, March 1947, p. 50.
[57] 6 & 7 Geo. 5, c. 50, s. 1 (1).
[58] (1861), L. and C. 58.
[59] Kenny, *Outlines of Criminal Law* (15th ed.), p. 217 citing *R.* v. *Aden* (1873), 12 Cox 512, and *R.* v. *De Banks* (1884), 13 Q.B.D. 29.

without this artificiality. This could have been achieved by saying that on a reasonable view of the facts, the persons who originally inserted the pennies in the box but failed to get through, and went off without pressing Button 'B' had abandoned the coins which had thereupon vested in the possession of the Postmaster-General. Both the elements of possession were present; the *corpus* element was satisfied by the fact that the coins were in the box which had been placed there expressly for that purpose; and the *animus* element was satisfied by the fact that the Postmaster-General intended to exclude people from entering the booth for an unlawful, speculative purpose. It would only be necessary, therefore, to rely on the notion of bailment, if the facts showed that there had been no abandonment. In any event the second ground of the decision that a trespasser who dishonestly acquires possession is guilty of larceny has been supported by the more recent case of *Hibbert* v. *McKiernan*.[60]

The facts of that case were as follows: the prisoner, while trespassing on some golf links belonging to the members of the Reddish Vale Golf Club, picked up eight balls which had been previously lost and which were found on him when arrested. He had previously been warned off the links, and the club had taken steps to prevent the taking of balls and to warn off trespassers. The justices, before whom the prisoner elected to be dealt with summarily on the charge of larceny, found that the property in the balls had been abandoned by their original owners, but nevertheless they were of the opinion that the prisoner intended to steal and did steal the balls in question. On appeal to a Divisional Court (Goddard, L.C.J., Humphreys and Pritchard, J.J.) by way of case stated one of the issues raised by the justices was 'whether the appellant acquired a title to the balls by finding them, which, as they had been abandoned by their original owner would prevail against the owners of the land on which they were found'. The learned Lord Chief Justice, however, had no difficulty in deciding that this question was really irrelevant to the point at issue. He based his decision simply on the fact that 'every householder or landowner means or intends to exclude thieves and wrongdoers from his property, and this confers on him a special property in goods found on his land sufficient to support an indictment, if the goods are taken

[60] [1948] 1 All E.R. 860.

therefrom, not under a claim of right, but with a felonious intent'. He went on to point out that there was clearly no licence from the club to all and sundry to go on the course and take what they could find, and the facts showed that the club did mean to exclude such pilferers, though the officials of the club did not know at any given moment the position or number of balls that might be lying on their property. He then suggested that any difficulty in the present case might have been avoided by describing the balls as the property of persons unknown, and he pointed out that at the present day allegations concerning the ownership of stolen property were, except in a few exceptional cases, treated as immaterial. The other learned justices delivered judgments to the same effect.

The decision may be summarised as follows:—

(1) Where property is abandoned on the land of X, X has a sufficient possession of such property as against trespassers to support an indictment for larceny against those who unlawfully interfere with his possession. The possession of X depends upon (a) the *animus possidendi* —the intent to exclude others from interfering with that property and (b) the *corpus possessionis*—the degree of power which was sufficient for the purpose of giving effect to (a). Absence of knowledge of the existence or the whereabouts of the property is immaterial. It is in fact cured by a larger intent to exclude others from the place where the property is. This, it is submitted, is the *ratio decidendi* of the case. Even this statement of the rule, however, is not free from difficulty, since there are at least two points which remain vague: (1) Is trespass limited to cases of intentional interference with another's possession of land, or does it include cases of mistake as well, as in the law of tort? *E.g.,* if there was a public right of way over the course, and a member of the public, mistaking the way, were to deviate from it, he would clearly have committed trespass. Would he also be guilty of larceny if he found something, while deviating, and appropriated it? (2) Must the trespasser have some definite object in view as being likely to result from his trespass? Must the purpose of the trespass be to search for lost property or would the accidental dis-

covery of the property, even after an intentional trespass, be a good defence? Perhaps the answer is to be found in the presence or absence, as the case may be, of a bona fide claim of right.

(2) (1) above only applies where the finder is a trespasser. Where he is not a trespasser, then the position is governed by the rules exemplified by *South Staffordshire Waterworks* v. *Sharman*,[61] *Elwes* v. *Brigg Gas Co.*,[62] *Bridges* v. *Hawkesworth*[63] and *Hannah* v. *Peel*.[64]

(3) Where the finder is a trespasser, and there is some doubt as to the correct person in whom to lay the property, it will be sufficient to make use of rule 6 (1) of the rules contained in Schedule 1 to the Indictments Act, 1915,[65] and to describe the things stolen as the property of persons unknown. It is submitted that this particular rule was unnecessary for the decision in *Hibbert* v. *McKiernan*,[66] and that it is therefore only an *obiter dictum* which should be restricted to its particular facts. Rule 6 (1) reads as follows: 'The description of property in a count in an indictment shall be in ordinary language and such as to indicate with reasonable clearness the property referred to, and if the property is so described it shall not be necessary (except when required for the purpose of describing an offence depending on any special ownership of property or special value of property) to name the person to whom the property belongs or the value of the property'. Notwithstanding this rule, Form No. 9 (relating to larceny) of the forms of indictment printed in the appendix to the Indictments Act, 1915, contains the name of the owner of the property, and *Archbold* suggests that it will probably be found convenient in practice to name the owner where he is known.[67] Though on a strict interpretation of the rule it would be possible to dispense with the necessity of mentioning the possessor in every case of larceny, this

[61] [1896] 2 Q.B. 44.
[62] (1886), 33 Ch.D. 562.
[63] (1851), 21 L.J.Q.B. 75.
[64] [1945] K.B. 509.
[65] 5 & 6 Geo. 5, c. 90.
[66] [1948] 1 All E.R. 860.
[67] *Criminal Pleading, Evidence and Practice* (31st ed.), pp. 40–41.

was clearly not the intention of the Act, as Form No. 9 shows. Since larceny is an offence against a particular person's possession, it would revolutionise the whole of the law of larceny to omit all reference to such person in the indictment. It is therefore submitted that the *obiter dictum* of the Lord Chief Justice and his learned brethren ought to be restricted to the facts of *Hibbert* v. *McKiernan*. Care ought to be taken to see that the exception does not become the general rule.

6

THE CHARITY MUDDLE

G. W. Keeton

The title of this lecture contains a criticism of the present state of the law of charities, which may perhaps be thought by some to need justification. It would be possible to plead on this point that every lawyer who has written on this topic in recent years has concluded that the law was in urgent need of amendment, although only one of them, Mr. J. W. Brunyate, has put forward proposals for a redefinition of what may be regarded as a charitable purpose in comprehensive terms.[1] However, as it is sometimes suggested that the views of learned writers fail to take due account of practice, I will rest my defence upon a recent case, which will undoubtedly provoke alarm and despondency among law students for many years to come. On July 9 last, the saga which appears in the reports under the title of *Re Diplock*[2] was related by the Court of Appeal in exactly 100 pages of print, after a hearing extending over twenty-three days. The decision of the Court of Appeal varied in a number of important particulars a learned judgment of Wynn-Parry, J., of similar length. Before the Court of Appeal, no less than thirteen counsel appeared, including four 'silks', and a host of precedents from 1669 onwards was discussed. If, as is anticipated, the case is heard again by the House of Lords, the amount of space which their judgment will occupy in the Law Reports will almost certainly exceed that which was devoted to the judgment of the Court of Appeal, where, mercifully, a judgment of the Court was delivered. This, however, is by no means the full extent of the complexities of this case, for the preliminary point in it was discussed by Farwell, J. (somewhat briefly) under the name of *Re Diplock* in 1940,[3] seven counsel, including two 'silks' (one of them the Attorney-General) being then employed. The

[1] J. W. Brunyate, *The Legal Definition of a Charity*, 61 *Law Quarterly Review*, pp. 268–285 and see 62 *Law Quarterly Review*, pp. 23 and 339. For definition, see p. 100, *post*.
[2] [1948] 1 Ch. 465.
[3] [1940] Ch. 988.

same point was reconsidered on appeal by the Court of Appeal in 1941[4] at somewhat greater length, the same seven counsel being then employed, and the judgment of Farwell, J. being reversed; and the point received fresh consideration at still greater length by the House of Lords in *Chichester Diocesan Fund and Board of Finance* v. *Simpson*.[5]

From this analysis of the case to date, the interested spectator may make some estimate of the costs. Naturally, a layman on hearing the facts set out above would assume that some question of the very greatest complexity, or with the widest social implications was being decided. What then was the point? It can be stated shortly, and in such terms that the layman with no knowledge whatever of legal principle can understand it. On November 3, 1919, Caleb Diplock made a will. The report does not tell us, but from internal evidence (including the terms in which it is drafted) it seems virtually certain that the will was drafted by a solicitor. The will contained a clause that the testator's executors should apply the whole of his residuary estate 'for such charitable institution or institutions or other charitable or benevolent object or objects in England' as the executors thought fit. This is the sort of clause beloved by some inexpert draftsmen. If the will had simply read that the executors should apply the whole of the residue 'for such charitable institutions' as the executors should select, there would have been no problem, the legal profession would have been much poorer, and a number of charitable foundations, as well as the executors, would have been a good deal richer. The technique of the charity draftsman in this case, indeed, recalls the story of the popular Cambridge rowing blue (in days long past), who was unable to pass Divinity in his 'Little Go'. At last, in desperation, his examiners agreed that if he answered one question correctly he would be regarded as successful. He was accordingly summoned for interview, and the presiding examiner asked, 'Mr. Jones, who was the first King of Israel?'

After prolonged meditation, the oarsman ventured, 'Saul—'

An expression of satisfaction took possession of the faces of the examiners, whereupon the oarsman, much encouraged, added: 'Also called Paul'.

[4] [1941] Ch. 253.
[5] [1944] A.C. 341.

Once again he was ploughed.

The moral is obvious. In conveyancing, as in other things, the golden rule is to say what you have to say, as plainly and concisely as possible, and then stop. Verbosity in *Re Diplock* has been responsible for the loss of many thousands of pounds.

The testator died on March 23, 1936, and the executors (one of whom was a lawyer) assumed that the clause gave them power to distribute the residue (which amounted to about £263,000) to such charities as they should select. Accordingly, during the next three years they distributed over £200,000 amongst 139 charities selected by them. During 1939, however, it occurred to some of the next-of-kin that the clause in the will might not give the executors the authority they had exercised, and in 1940 an action was brought by forty-eight next-of-kin against the executors, the charities and the Attorney-General. It was this action which reached the House of Lords in 1944, when their Lordships vindicated the earlier authorities by holding that the term 'benevolent' is wider than the term 'charitable', so that if executors are allowed to distribute between 'charitable *or* benevolent' purposes, the parts to be distributed to each cannot be separated, and the whole gift is therefore void for uncertainty, and lapses. In this case, as it was residue which lapsed, the next-of-kin were entitled to it.

So ended the first phase of this fascinating case, during which there had been some illuminating discussion of the possible meaning which the phrase 'charitable or benevolent' might bear. For example, if I say that my profession is that of counsel, or barrister, I am equating the terms 'counsel' and 'barrister', and 'or' is there used with the sense of *id est*. This, however, is not the normal meaning of 'or', and it was not its meaning in *Re Diplock*. 'Or' is normally used disjunctively, in order to indicate the possibility of choice between different things.

Unfortunately, when the House of Lords, in 1944, gave their final opinion on this matter, five years after the propriety of the executor's action had been questioned, the executors had already distributed most of the residue to 139 charities. Some charities, like the prudent virgins in the parable, had kept their lamps burning and had already spent their windfalls, either in paying off mortgages, or in building extensions of their premises. Others, however, had left the sums received, either in their

general funds, or in a special account. The next step taken by the next-of-kin was to call on the executors to make good the loss out of their own pockets—a stern reminder of the risks which a person runs gratuitously when he agrees to act as an executor or trustee. The executors made good a substantial portion of the loss in a compromise approved by the Court, but they were unable to refund in full. The second action entitled *Re Diplock* was therefore initiated with the object of compelling the charities to refund the sums which they had received without being entitled to them, and the problem to be resolved was whether there existed any legal or equitable principle which would compel the institutions which had been wrongly paid to refund. The extremely interesting answers to this problem given by Wynn-Parry, J. and the Court of Appeal are beyond the province of this paper; but the whole of this litigation is a salutary reminder that the task of the draftsman who is asked to give legal effect to the wishes of one who desires to benefit charitable institutions is beset with pitfalls, and it seems to indicate that the penalties of a trifling slip, in putting 'charitable *or* benevolent institutions', instead of 'charitable *and* benevolent institutions' are excessive. Most of us would agree that that branch of the law which purports to define a charitable purpose is in an unsatisfactory state. The difficulty is to suggest better definitions than those which have so far been attempted.

As is well known, the starting-point of modern considerations of what constitutes a charitable purpose is Lord Macnaghten's definition in *Commissioners of Income Tax* v. *Pemsel*.[6] In that case, he says: '"Charity" in its legal sense comprises four principal divisions; trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads'.

And on the fourth head, he comments, 'The trusts last referred to are not the less charitable in the eye of the law, because incidentally they benefit the rich as well as the poor, as, indeed, every charity that deserves the name must do either directly or indirectly'.

A moment's reflection will lead to the conclusion that this so-called definition (the term is not Lord Macnaghten's) is not

[6] [1891] A.C. 531, 583.

really a definition at all, but a classification. 'Relief of poverty', 'advancement of education', and 'advancement of religion' are all exceedingly vague terms, which require a good deal of elucidation before they can be of service to the lawyer who is advising, or the judge who is deciding. And what are we to make of the fourth head of 'other purposes beneficial to the community', especially when the decisions have long ago established the proposition that there is a wide class of purposes beneficial to the community (or generally considered so), which are certainly not charitable? For example, if we are to accept the judgment of social historians, that progress is beneficial to the community, then we must concede that in modern times, with the development of Parliamentary Government, social progress has normally been secured by social legislation. Nevertheless, in *National Anti-Vivisection Society* v. *Inland Revenue Commissioners*[7] the majority of the House of Lords adopted an extract from Lord Parker's speech in *Bowman* v. *The Secular Society Ltd.*,[8] in which he said: 'Now if your Lordships will refer for a moment to the society's memorandum of association you will find that none of its objects except possibly the first are charitable. The abolition of religious tests, the disestablishment of the Church, the secularisation of education, the alteration of the law touching religion or marriage, or the observation of the sabbath, are purely political objects. Equity has always refused to recognise such objects as charitable. It is true that a gift to an association formed for their attainment may, if the association be unincorporated, be upheld as an absolute gift to its members, or if the association be incorporated, as an absolute gift to the corporate body, but a trust for the attainment of political objects has always been held to be invalid, not because it is illegal, for every one is at liberty to advocate or promote by any lawful means a change in the law, but because the Court has no means of judging whether a proposed change in the law will or will not be for the public benefit, and therefore cannot say that a gift to secure the change is a charitable gift'.

Accordingly, in the more recent case, the House of Lords took refuge behind the proposition (stated in Thyssen on *Charitable Bequests* that 'the law cannot stultify itself by holding that it is

[7] [1948] A.C. 31.
[8] [1917] A.C. 406, 492.

for the public benefit that the law itself shall be changed'—a somewhat strange doctrine for the mid-twentieth century.

In the *National Anti-Vivisection Society's Case,* the House of Lords, overruling an earlier decision, *Re Foveaux,*[9] held that a society advocating a change in the law to abolish vivisection, was not a charitable organisation. Previously, the law of charities had adopted the peculiarly liberal point of view that a society to promote vivisection was good as a charity, on the ground that it promoted medical education; and that a society advocating the suppression of vivisection was also charitable, since its object was to promote kindness to animals which, in other contexts, is regarded as a charitable purpose. *Re Foveaux,* however, was decided over fifty years ago, and Lord Wright gave a clear clue to the changed attitude of the Courts today when he said, 'To my mind the scale of the anti-vivisectionist mounts up and kicks the beam. A statesman is constantly weighing conflicting moral and material utilities'.

That observation, in my submission, goes to the root of the matter. The solution of the problem whether a purpose is charitable or not is really a branch of public policy, for the result of deciding that a purpose is charitable is to place it within a favoured class, from which act it will normally derive substantial financial benefits. For example, in *Re Hummeltenberg,*[10] decided in 1923, Russell, J. held that a project for the establishment of a college for the training of spiritualist mediums could not be regarded as charitable. Who shall say whether this decision will always stand? The discouraging effect of the decision upon the training of spiritualist mediums has been considerable, however.

Thus the judge, in deciding charity cases is really making a decision, often of great importance, upon the trend of public policy. He indicates the channels into which private philanthropy can be directed with the greatest effect. In form he may appear to follow earlier decisions, but except where the terms of a later gift are identical with that of a gift in a reported case, his margin of freedom is wide, and it is impossible to exclude the personal factor in the choice between competing analogies. That is why, except in cases where a decision on an identical gift

[9] [1895] 2 Ch. 501.
[10] [1923] 1 Ch. 237.

already exists, it is often almost impossible for a draftsman to predict whether the gift will take effect or not. Two striking illustrations of this are *Keren Kayemeth le Jisroel Ltd.* v. *Inland Revenue Commissioners*[11] (the 'Jewish National Home' Case), and the more recent decision in *Williams' Trustees* v. *Inland Revenue Commissioners,*[12] in which it was held that a fund for the purpose of maintaining a Welsh institute in London 'for promoting the moral, social, spiritual and educational welfare of Welsh people' was non-charitable, as the community to which it was applicable was a fluctuating one.

How subjective the test applicable may be is shown by the conflicting decisions of English and Irish courts on gifts to closed orders of nuns. The law of charities in Ireland has been developed by judicial precedents from the same source as our own, yet the Irish courts have held that gifts to such closed orders are good,[13] and the English courts have held them to be bad.[14] Is that difference entirely unconnected with the fact that the predominant religion in Southern Ireland is Roman Catholicism, whilst in England the established religion is Protestantism?

In deciding that a purpose can properly be regarded as charitable, the Court is not making a decision which is binding in perpetuity, for the law of charities has developed its own safety valve. 'If', said Lord Simonds in the *National Anti-Vivisection Society Case,* 'by a change in social habits and needs, or, it may be by a change in the law, the purpose of an established charity becomes superfluous or even illegal, or if, with increasing knowledge, it appears that a purpose once thought beneficial is truly detrimental to the community, it is the duty of trustees of an established charity to apply to the Courts, or in suitable cases, to the Charity Commissioners, or, in educational charities, to the Minister of Education, and ask that a *cy-près* scheme may be established. A charity once established does not die, though its nature may be changed. But it is wholly consistent with this that in a later age the Court should decline to regard as charitable a purpose, to which in an earlier age that quality would have been ascribed'.

[11] [1932] A.C. 650.
[12] [1945] 2 All E.R. 236; [1947] 1 All E.R. 513.
[13] *McNamee* v. *Mansfield,* [1945] I.R. 13; *Maguire* v. *A.G.,* [1943] I.R. 238.
[14] *Re Coats' Trusts,* [1947] 2 All E.R. 422.

Here, it will be seen, the social implications of charity decisions are very clearly recognised. Nevertheless, it is difficult, if not indeed impossible, to discover the general conception of social policy on which the decisions are based. This difficulty is very clearly expressed by Lord Sterndale, M.R. in *Re Tetley*,[15] where he says, 'I am unable to find any principle which will guide one easily, and safely, through the tangle of the cases as to what is and what is not a charitable gift. If it is possible I hope sincerely that at some time or other a principle will be laid down. The whole subject is in an artificial atmosphere altogether. A large number of gifts are held charitable which would not be called charitable in the ordinary acceptation of the term, and when one takes gifts which have been held to be charitable, and compares them with gifts which have been held not to be charitable, it is very difficult to see what the principle is on which the distinction rests'.

Like many other things in Equity, the conception of a charitable purpose, such as it is today, is explicable only in the light of its history. All modern discussions of this question take as their starting-point the Statute of Charitable Uses of 1601, which gives the following enumeration of charitable purposes: 'The relief of aged, impotent and poor people; the maintenance of sick and maimed soldiers and mariners; schools of learning, free schools, and scholars of universities; the repair of bridges, ports, havens, causeways, churches, seabanks and highways; the education and preferment of orphans; the relief, stock or maintenance of houses of correction; the marriage of poor maids; the supportation, aid and help of young tradesmen, handicraftsmen and persons decayed; the relief and redemption of prisoners and captives; the aid or ease of any poor inhabitants concerning payment of taxes'.

This is a rather odd collection. It is manifestly not a definition at all, but an enumeration of a number of the more important charitable purposes at the time when the Act was passed, and it is in this way that it has always been regarded by the Courts, for many of the purposes held good in recent times under Lord Macnaghten's fourth head can only be remotely associated with the objects specified in the Statute. Where, for example, can one perceive in these objects an analogy with a gift

[15] [1923] 1 Ch. 258, 266.

of a sum of money to promote chess-playing among young persons in a specified town—a purpose which was held to be charitable in *Re Dupree's Trusts*,[16] or with children's rides on elephants which, as educational, were regarded as charitable purposes by Farwell, J. in *Re Lopes*?[17] Moreover, it should be noticed that certain assumptions underlie the list of 1601. This list includes 'the repair of bridges, ports, havens, causeways and seabanks', yet a gift of money for the repair of a bridge or seabank on a private estate, or (for that matter) for a private road, has never been regarded as charitable. The element of public benefit was present as much in 1601 as it is today. Incidentally, it should be noticed that such objects as these, which were of great importance in 1601, are not nearly so important today, and might not necessarily be regarded as charitable objects at all. Social conditions have changed, and objects that were left to private philanthropy at the end of Elizabeth's reign are today major public services, for which the resources of local or national taxation are available. In the year 1948 there would be many interesting things to be said upon the question whether a gift to the Railway Executive for the repair of Southampton Docks is still charitable.

So far as I know, the relation between the Statute of Charitable Uses of 1601 and contemporary social conditions has never been fully explored, although, as one would expect, Holdsworth has supplied us with valuable clues. He points out that this Statute must be closely linked with our first great Poor Law, passed in the same year, and with still another Act passed in the same year, for the relief of soldiers and sailors by means of weekly pensions determined by Quarter Sessions, and paid out of a weekly rate levied on the parishes. These Acts were the consequences of the important economic changes of the sixteenth century, and they were evoked by a new conception of social responsibility. In the words of a high authority, they were 'part of a paternal system of government under which the rulers regarded the maintenance of the usual prosperity of every class as part of their duties'.[18] This involved the encouragement and regulation of charitable gifts from which the community in

[16] [1945] Ch. 16.
[17] [1931] 2 Ch. 130, 136.
[18] Leonard, *Early History of Poor Relief*, p. 203.

general, and especially the poorer members of it, could benefit.

There were, however, additional reasons peculiar to the law of charities, for the existence of the Statute of Charitable Uses. If the objects of the Statute are examined in detail, it will be seen that they can for the most part be divided into the following four classes :—

(1) *The relief of sick and maimed soldiers and sailors,* to which should be added the redemption of prisoners and captives. This was a matter of national concern at the end of Elizabeth's reign, for the long war on land and sea with Spain was ending, and numbers of destitute and maimed soldiers and sailors were crowding into the ports and towns. In an age when the first hesitant steps towards a national poor law system were being taken, the existence of this potentially turbulent class was a matter of general concern. The relief and redemption of prisoners and captives does not refer to persons lying in English jails for unpaid fines and debts, but to those unfortunates who had been captured abroad or on the high seas by non-Christian pirates, and whose release from slavery in the galleys or ashore on the North African coast could be secured by payment of ransom.

(2) *The relief of deserving poverty,* mainly in an urban setting. The Tudor period, and particularly Elizabeth's long reign, saw the increase of poverty on what was, for those times, an alarming scale. This was due to two distinct causes. The first was a change in the methods of agriculture, and an extension of sheep-farming, leading to the loss of employment by many agricultural labourers. These drifted into the towns, and in many cases became a charge on municipal funds. It was this class of poverty which was adversely affected by the suppression of the monasteries, for although the extent of the relief afforded by them can be exaggerated, it is nevertheless true that the monasteries gave a good deal of casual employment, and some of them ran something approximating to casual wards. The suppression of the monasteries therefore threw these rural unfortunates upon municipal relief, or in some cases, led to the formation of gangs of vagabonds, who terrorised the countryside. Altogether apart from this type of pauperism, there was another, urban in origin, which was due to the decay of the guilds, and the apprenticeship system which it regulated. Elizabeth's reign showed this decay far advanced, and its progressive replacement

by individualist enterprise, employing labour hired for a wage, and uncertain in duration. Moreover, with the decay of the guilds, there collapsed a system of municipal philanthropy, which had not only reduced urban pauperism to small proportions, but had also contributed largely to municipal education, in the foundation of grammar schools, to municipal planning, in the construction of civic roads and buildings; and even to municipal religion, for the guilds had played a prominent part in the erection of some of the largest and most beautiful of England's parish churches. It is for this reason that the list in the statute emphasises such objects as the building and maintenance of schools, the repair of municipal roads and buildings, the education of orphans, the marriage of poor maids, and 'the supportation and help of young tradesmen, handicraftsmen and persons decayed'. One other purpose requires a word of explanation—'the relief, stock, or maintenance of houses of correction'. These were the poorhouses of the period, to which the magistrates would consign idle and destitute vagabonds. At the end of Elizabeth's reign they were full to overflowing, and their maintenance was a problem which the Statute of Charitable Uses and the Poor Law Act of 1601 attempted to solve, with only partial success.

(3) *The advancement of education.* This object is implicit in the maintenance of schools, and scholars of universities, and, in another environment in 'the education and preferment of orphans'. At this date, it was already well understood that the advancement of all kinds of education was a charitable purpose, deserving of encouragement by private philanthropy, and the existence of the colleges of Oxford and Cambridge, of such great schools as Eton and Winchester, and of a surprisingly large number of local grammar schools (in which many of the greatest Elizabethans, for example, Shakespeare, Drake and Hawkins, were educated) sufficiently testified. The Oxford and Cambridge colleges and the great schools are recognised as charitable by s. 2 of the statute, but they are exempted from the system of control created by it because no special problems in respect of these had been created by the social and economic changes of the sixteenth century.

(4) *The advancement of religion.* On this head, the statute is almost completely silent, and the only reference to it is in the

inclusion of churches in a list of buildings, the repair of which is charitable.[19] This, at first sight represents a wide change from medieval practice, for at that time the entire activities of the church, whether in the promotion of religion, or in the building of cathedrals, monasteries and chantries, had been recognised as charitable. Indeed, they were 'pious uses', and as Lord Eldon pointed out in *Moggridge* v. *Thackwell*,[20] 'we all know there was a period when, in this country, a portion of the residue of every man's estate was applied to charity', and until the Reformation this usually meant for the advancement of religion. It is in the existence of this former rule of English law that the origin of the *cy-près* doctrine is to be traced. It was customary for a person to indicate specific charitable purposes to be benefited, and if it was impossible to satisfy the wishes of the deceased, the next nearest object must be found. But the last thing that the Elizabethan legislator wanted was the intervention of private philanthropy in such a troubled question. The monasteries had been suppressed by Henry VIII, and the chantries by his son, Edward VI, who had also legislated against a return of Roman Catholicism under the head of 'superstitious uses'. Elizabeth, with infinite difficulty, had re-established a national Church, hanging both Roman Catholics and Anabaptists in the process. If, therefore, a man gave property to any religion other than that professed by the Anglican Church, he not only did not advance a charitable purpose, but he also broke the law of the land; in addition, he exposed himself to proceedings in the ecclesiastical courts for heresy. It was only when, in the eighteenth and nineteenth centuries, the attempt to establish uniformity of religious belief had been finally abandoned, and the disabilities on dissenters, non-Christians and Roman Catholics were progressively removed, that the Courts, interpreting (as they claimed) the spirit of the Act of 1601, gradually admitted the advancement of these religions into a class of charitable objects. For all that, the Roman Catholic practice of 'celebrating masses for the dead', was recognised as an infringement of the Statute of Superstitious Uses before the decision of the House of Lords in *Bourne* v. *Keane* in 1919,[21] and it was not until 1934 that the

[19] In medieval times, the repair of churches in towns was often undertaken by the Guilds.
[20] (1802) 7 Ves. 69.
[21] [1919] A.C. 815.

practice was recognised as a charitable purpose in *Re Caus.*[22] Even today (it has already been shown) a gift for a closed order of nuns is not charitable here, although it is in Ireland; nor would a gift for the advancement of spiritualism be regarded as charitable. In all probability, we have already passed the high-water mark of freedom to dispose of money for religious purposes, and at the same time to claim for these gifts recognition as charities. The nineteenth century decisions admitted some strange beliefs to the status of religion—for example, those of Joanna Southcote in *Thornton* v. *Howe,* decided in 1862.[23] To indicate how far this decision goes, it is sufficient to quote the following extract from the Master of the Rolls' decision: 'The bequest is to propagate the sacred writings of Joanna Southcote. She, from her writings, was a very sincere Christian; but she laboured under the delusion that she would be made the medium of a miraculous birth of a child at an advanced period of her life, and that thereby the advancement of the Christian religion on earth would be promoted. But her works, as far as I have looked at them, contain but little upon this subject, and nothing which could shake the faith of any sincere Christian. In truth, though her works are in a great measure incoherent and confused, they are written obviously with a view to extend the influence of Christianity; and I cannot say that the bequest of a testator to publish and propagate works in support of the Christian religion is a charitable bequest, and at the same time say that if the testator should select for this purpose some three or four authors whose works will produce that effect, such a bequest thereupon ceases to be charitable; neither can I do so if a testator should select one single author whose works he thinks will produce that result. If a testator were to leave a fund for the purpose of propagating at a very reduced price the religious writings of Dr. Paley or Dr. Butler, I should be of opinion that the bequest was charitable in its character. I must hold the same in respect of what the testatrix has called the sacred writings of Joanna Southcote'.

There spoke a great apostle of toleration in an age of intellectual freedom. If today, however, the Courts should appear a little more hesitant in their approach to this question, it is not

[22] [1934] 1 Ch. 352.
[23] (1862), 31 Beav. 14.

because of a weakening of the principle of toleration, but rather because the judge today is more conscious of another element in the problem—the element of social benefit. Planning, that is to say, may eventually intrude into the law of charities. Yet at this point it may be well to remember a word of warning from that great master of Equity, Lord Eldon, who once observed that if testators were not assured that the objects of their bounty would receive their gifts, they would be in danger of omitting charitable bequests from their wills altogether.

Today, it is not often gifts for religious purposes which create problems, but gifts for political objects. In spite of the decision in *Re Scowcroft,*[24] it is now clear that a gift for the advancement of the work of a political party is not charitable, although it is surprisingly difficult to find this principle clearly formulated in the decisions. Even educational work of a serious nature in connection with the party's objects falls under the ban, as the decision in *Bonar Law Memorial Trusts* v. *Inland Revenue Commissioners*[25] shows. We may congratulate ourselves upon the wisdom shown by the Courts in handling this delicate question, and in the attitude of neutrality which they have adopted, whilst recognising that increasingly difficult marginal cases are likely to occur from time to time. On the other hand, the suggestion in the recent decision of the House of Lords in *National Anti-Vivisection Society* v. *Inland Revenue Commissioners*[26] that the advocacy of any legislative change cannot be a charitable purpose, may in the long run prove to be too precipitate a retreat from this field.

It will be seen that this paper has so far sought to place the rules and decisions relating to charitable purposes in their historical and social setting, but it has not so far attempted to say what a 'charitable purpose' is. It has been suggested that the decision whether a gift is charitable or not is really a decision on one head of public policy; and it has also been shown that such decisions involve a consideration of social benefit. Putting the matter in terms recognisable by the Chancery practitioner, we may say that all charitable gifts are 'beneficial to the community', but as Lord Cave said in *A.G.* v. *National Provincial*

[24] [1898] 2 Ch. 638.
[25] (1933), 49 T.L.R. 220; see *Re Hopkinson,* [1949] 1 All E.R. 346.
[26] [1948] A.C. 31.

Bank[27]: 'Lord Macnaghten did not mean that all trusts beneficial to the community are charitable, but that there are certain charitable trusts which fall within that category; and therefore to argue that because a trust is for a purpose beneficial to the community it is therefore a charitable trust is to turn round his sentence and to give it a different meaning. So here it is not enough to say that the trust in question is for public purposes beneficial to the community or is for the public welfare; you must show it to be a charitable trust'.

Observations such as these place the subject in an atmosphere of almost intolerable obscurity. They seem to imply:—

(1) That all charitable trusts are beneficial to the community.

(2) That not all trusts beneficial to the community are charitable.

(3) That within the class of trusts beneficial to the community (*i.e.* public trusts) some independent criteria may be applied to determine whether a particular public trust is charitable or not.

Unfortunately, we are given only vague clues as to what those criteria may be, and where the gift cannot be assigned to one of the three wide classes: 'advancement of religion', 'advancement of education', and 'relief of poverty', the determining criterion is the definition of Lord Macnaghten's fourth class, *i.e.* 'Those trusts beneficial to the community, but not falling under any of the other three heads'. So that this process of definition is completely circular in operation.

Mr. Brunyate,[28] deriving some encouragement from a classification of charities included in the War Damage Act, 1943, s. 69, suggests a classification of charitable purposes under the following heads:—

(1) The relief of poverty or other distress.

(2) The advancement of education, learning, science and research.

(3) The public advancement of religion.

(4) Purposes beneficial to the community not falling within the preceding heads, which satisfy the following rules:—

[27] [1924] A.C. 262.

[28] *The Legal Definition of a Charity*, 61 *Law Quarterly Review*, pp. 268–285.

(a) A purpose is not charitable unless the benefit thereby conferred to the community is substantial having regard to the nature of what is given.

(b) A purpose which is for the direct benefit of a particular class of persons (other than a State institution) is not charitable, although it results in an indirect benefit to the community.

(c) Subject as aforesaid a purpose is charitable if either:—

(i) It confers a direct and tangible benefit on all members of the community; or

(ii) it confers a direct and tangible benefit on a particular institution of the State tending to increase the efficiency of its communal activity; or

(iii) not being for the direct benefit of a particular class of persons it is in the general enlightened opinion of the time wholly for the benefit of the community although such benefit be intangible.

(d) In this context the community means either the international community, the national community, or a local community (that is to say, a substantial geographical section of the national community) or a section of such a community determined by sex or age. Any other section of the community is to be regarded as a particular class of persons'.

Mr. Brunyate himself adds immediately afterwards that his definition 'may appear at first sight not to add much to Lord Macnaghten's', and I would respectfully agree with him. His definition appears to me to bristle with unsolved difficulties. How, for example, are we to determine whether a benefit is 'substantial' or not. For example, would the benefit conferred in *Re Dupree's Trusts* (the chess-playing case) be considered substantial? And by what tests do you decide what is meant by 'beneficial' (a difficulty which already exists)? For example, I was once asked whether a gift to a clinic for the extension of a knowledge of birth control could be regarded as charitable. And how would Joanna Southcote's writings (or Dr. Paley's) fare today under such a definition?

Again, what is meant by a 'direct and tangible benefit'? This appears to be a big question. Or is it simply another way of saying 'direct pecuniary benefit'? And I think most judges would be dismayed by the task of applying the language of (c) (iii).

My own solution of the conundrum is a more restricted one. I do not think there is any comfort to be gained from definitions in this branch of the law. We must rely, as heretofore, upon the social acumen of the judges; but at the same time we are entitled perhaps to ask for a little more boldness in the formulation of principles. This is a branch of the law in which precedents lose their cogency through a change in social conditions, and in which analogies are frequently remote. Accordingly, I would ask for a periodic statement, preferably by the House of Lords, of some of the general principles upon which their charity decisions are founded, and for a reduction in the disastrous effects of decisions such as *Re Diplock*. Where an obvious technical slip such as this has been made, I would ask for power for the Court to direct the application of the fund exclusively for charitable purposes. But I should regard with apprehension any attempt to confine the development of the law of charities within the limits of a statutory definition.

In a review of the most significant developments in the law of torts during the past twenty-five years, a distinguished Canadian authority says: 'The most important trend in the modern law of torts is the attempt to seek broad generalisations under which the facts of individual instances can be related, not with a view towards automatic solution, but rather with a view to the object or purpose to be attained'.[29]

It is the reflection of a similar attitude in the law relating to charities, rather than complicated definitions and technical subtleties, which is urgently required at the present time.

[29] C. A. Wright, *The Law of Torts*, in 25 *Canadian Bar Review*, p. 75.

7

THE THREE TYPES OF LAW

GEORG SCHWARZENBERGER

THE self-limitation of the analytical approach to jurisprudence has led to the neglect by legal theory of its most fundamental task, the quest for the essence of law and justice. Philosophers have attempted to fill the gap and have provided a bewildering number of speculations on the nature of law and justice. Yet, whatever their essence may be, law and justice do not exist *in vacuo*. They are social agencies and fulfil social functions. The use which is made of law and justice depends on the type and character of the human association in which they find their realisation. An investigation into the functions fulfilled by law and justice within different types of social groups may assist in a better understanding of their intrinsic nature.

SOCIETY LAW AND COMMUNITY LAW

Sociologists, following in the footsteps of Sir Henry Sumner Maine, Tönnies, and Max Weber,[1] have elaborated the basic distinction between society and community. This dichotomy is as vital for the understanding of legal[2] as of other social phenomena.

A few examples may illustrate the different atmospheres prevailing in societies and communities.

To use a simile of Schopenhauer, who applied it to human society as such, a society in the strict meaning of the term may be compared to an assemblage of hedgehogs, living in such a climate that they are compelled to huddle together in order to

1 Sir Henry Sumner Maine, *Ancient Law* (1861); Ferdinand Tönnies, *Gemeinschaft und Gesellschaft* (1887); Max Weber, *Wirtschaft und Gesellschaft* (1922).

2 See for an analysis, from the point of view of international law, the present writer's *The Rule of Law and the Disintegration of the International Society*, 33 *American Journal of International Law* (1939), pp. 56ff.; *Jus Pacis ac Belli? Prolegomena to a Sociology of International Law*, 37 *ibid.* (1943), pp. 460ff., and '*International Law and Society*', 1 *Year Book of World Affairs* (1947), pp. 159ff.

keep warm, yet simultaneously subject to an instinct of repulsion, based on their characteristic anatomical structure. Or, a valuation of man which is congenial to a society may be found in Hobbes' *Leviathan*: 'The value, or worth of a man, is as of all other things, his Price; that is to say, so much as would be given for the use of his Power: and therefore is not absolute; but a thing dependent on the need and judgment of another'.[3] Similarly, Spinoza, visualising the state of nature in terms of a society, arrives at the conclusion: 'The natural right of every individual is only determined by his power'.[4]

A community would call for very different motivations of action and forms of behaviour. The way of life which corresponds to this pattern has found its classical expression in the *Meditations* of Marcus Aurelius[5] and in the Sermon on the Mount, but this spirit is just as much at home in Chinese philosophy. Thus Confucius describes a gentleman as one who 'never contends in anything he does—except perhaps in archery. Even then he bows to his rival and yields him the way as they ascend the pavilion; in like manner he descends and offers him the penalty cup—in his contentions he is still a gentleman'.[6]

What is the criterion which enables us to distinguish a society from a community? According to Professor Macmurray, it is the difference in the intentions involved: 'The intention involved in society lies beyond the nexus of relation which it establishes. In community it does not. It follows that society is a means to an end, while community is an end itself. This may be stated from another angle by pointing out that a society can always be defined in terms of a common purpose, while a community cannot'.[7] Different intentions produce different mentalities and atmospheres. Only when there is a sufficient degree of solidarity between the members of a group, the *raison d'être* of the association extends beyond the fulfilment by the group of the typical functions of a society, that is to say, the adjustment of diverging

[3] Part 1, Chap. 10.
[4] *Tractatus theologico-politicus,* Chap. 16.
[5] 11, 18.
[6] *Analects,* Vol. 1, Book 3, Chap. 7. See also Wen Kwei Liao, *The Individual and the Community* (1933), pp. 140ff., and F. T. Cheng, *China Moulded by Confucius* (1946).
[7] J. Macmurray, *Freedom in the Personal Nexus,* in R. N. Anshen (ed.), *Freedom: Its Meaning* (1942), p. 187. See also R. G. Collingwood, *The New Leviathan* (1942), Chaps. 19–24.

interests and the achievement of common short-term objectives. Then, the continuation and perpetual integration of the group becomes its chief purpose. The members of a community are united in spite of their individual existence, whereas the members of a society remain isolated in spite of their association. A community is based on trust and a society on distrust.

These terms are to be understood as 'ideal' or 'pure' types. In real life these groups do not exist as pure communities or societies; they are hybrids. Communities such as a family, nation, or church may be tainted by greater or smaller admixtures of society elements. Correspondingly, societies like a joint-stock company or international society, engulfed as it is in a system of power politics, have to accept a minimum of ethical standards which, however, remain dwarfed in these incommensurate surroundings. It should also be kept in mind that, at one and the same time, man belongs to a number of social groups and, therefore, simultaneously displays the vastly different attitudes which are required by life in societies and communities. This simultaneity of society and community relations has been strongly emphasised by Spencer, who has perhaps overstressed their exclusive character: 'The broad fact then, here to be noted, is that Nature's modes of treatment inside the family-group and outside the family-group are diametrically opposed to one another; and that the intrusion of either mode into the sphere of the other would be destructive either immediately or remotely'.[8]

It may be rightly held that, if only sufficiently generally defined, some functions of law are not dependent on the classification of a group as a community or society but are common to both these basic forms of human association. Thus, whenever a group makes use of law as a social agency, it is the function of law to provide rational rules of conduct which, in case of conflict, can be authoritatively determined, and, if necessary, automatically enforced against the lawbreaker. The distinction, however, between society and community makes it possible to determine, with greater accuracy than has been the custom so far, the specific—and vastly differing—functions fulfilled by law within these groups.

[8] H. Spencer, *The Man versus the State* (1892), p. 354.

THE FUNCTIONS OF SOCIETY LAW (THE LAW OF POWER)

To illustrate the functions of society law, a hypothetical example may serve the purpose. What would a group of well-armed gangsters do who had made up their minds to establish their rule over a powerless people and themselves as the ruling class in that country? In the first place, they would accumulate overwhelming military power in their hands and create a monopoly of physical power. They would reserve for themselves all important political decisions and merely grant a sham representation to their subjects if they thought this to be an advisable screen for their egocentric designs. They would jealously insist on their exclusive right to all key positions in the judiciary and administration. Through the agency of the Government they would expropriate the land, take possession of the best parts of it, and leave to the subjects only as much as secured them a bare minimum. Any part of their income beyond starvation point would be taken from the subjects by way of taxation, and their wages and salaries would be fixed in such a manner that all taxation would lie exclusively on their shoulders. The Government would control education as well as freedom of opinion and political association. Finally, it would be an important task of the Government to inculcate the belief both among the subjects and abroad that the subjects were backward and incapable of any development toward real self-government and that, therefore, it was in their own best interest to be ruled by the super-race. Though it was left to Hitler's 'New Order' to develop to its logical conclusions such a system of wholesale exploitation, the treatment in the past of subjected populations by their conquerors and the deeds of early imperialism indicate that this pattern of society relations is not a mere academic speculation.[9]

In this kind of social environment Bentham's definition of the functions of law would assume a meaning slightly different from that envisaged by its author: 'All the functions of law may be referred to one or other of these four headings: to provide subsistence, to aim at abundance, to encourage equality and to maintain security'.[10]

[9] Cf. F. Oppenheimer, *Der Staat* (1926); N. Leys, *The Colour Bar in East Africa* (1941), pp. 145–146, or R. A. Brady, *Business as a System of Power* (1943).

[10] *The Theory of Legislation,* Vol. 1, p. 123.

Though power is the overriding element in such a society as has been described above, it tends to become law. The arbitrary extravagances of individual members of a ruling class are antagonistic to the interests of the class as a whole. In its own interest, therefore, every slave-holding society has to give a minimum of protection to its slaves. As much as it is in the interest of the masters not to drive their helots to despair and, for this reason, to impose upon themselves a certain amount of self-limitation, from the standpoint of the oppressed the harshest law of power is preferable to the blind play of brute force. As the history of early Roman law and the struggle between plebeians and patricians show, the first consideration and strategic objective of inferior orders are not the mitigation and reform of the law but its fixation and their participation in its interpretation and application. The function of a society law which is characterised by gross disparities in rights and duties may be defined as the stabilisation of a relationship of power. This kind of law provides one of the three fundamental types of law: *the law of power.* Such a law best serves its purpose if its real character and function are disguised as much as possible behind a façade of technicalities and quasi-ethical doctrines. It, therefore, necessarily tends to fulfil the concomitant function of an ideology by which the vested interests protected by it are disguised and made to appear identical with the interests of all.[11] This is what Pascal meant when he wrote: 'It is right that what is just, should be obeyed; it is necessary that what is strongest, should be obeyed. Justice without might is helpless; might without justice is tyrannical. Justice without might is gainsaid, because there are always offenders; might without justice is condemned. We must then combine justice and might, and for this end make what is just strong, or what is strong just. Justice is subject to dispute; might is easily recognised and is not disputed. So we cannot give might to justice, because might has gainsaid justice, and has declared that it is she herself who is just. And thus being unable to make what is just strong, we have made what is strong just'.[12]

THE FUNCTIONS OF COMMUNITY LAW
(THE LAW OF CO-ORDINATION)

It could be imagined that a community proper could entirely do

[11] Cf. the speech of Thrasymachus in Plato's *Republic,* 1, 3.
[12] *Pensées,* No. 298.

without law. Groups such as a family, blood brotherhood, or church could be conceived as regulating their affairs without organs which have to interpret authoritatively the standards of conduct demanded by these relationships and without sanctions to enforce these obligations. Yet even in intimate groups of this kind situations may arise in which, in the absence of legal norm and institutions, man will not necessarily 'both discern what is good for mankind as a community and invariably be both able and willing to put the good into practice when he has perceived it'.[13] Even within a community abnormal situations may arise in which common moral standards require to be supplemented and supported by law. Particularly in communities which comprise more than a small number of members, there is need for agencies which give visible expression to common values and, whenever necessary, adapt them to changing circumstances. It would be hasty to assume that, in groups of this kind, sanctions are entirely lacking. The sanctions which are at the disposal of a highly integrated community are more refined and often different in kind from those available in a more crudely organised society. The members of a community may value membership in it and approval of their conduct by the other members to such an extent that the mere possibility of disapproval by, and exclusion from, the community acts as a deterrent and guide for the actual behaviour of its members.[14] Thus, even a community law has its own system of inherent and congenial sanctions.

The law of the community serves the purpose of assisting in the maintenance and continuous integration of the community and the protection of the group against abnormal aberrations on the part of its members. Its main function consists in promoting the best co-ordination of efforts and activities in the interest of the community by the rationalisation of customary rules of behaviour. Spheres of work have to be defined. Duties and responsibilities have to be assigned. If rights are granted, this is done, because it is in the interest of the whole, not because a member has the power to demand it. In the early Roman community the maintenance of the family *sacra,* a religious duty incumbent upon the *pater familias,* was considered to be of the

[13] Plato, *The Laws,* trans. A. E. Taylor (1934), p. 265.
[14] Cf. Lord Bryce, *'Primitive Iceland'* in *Studies in History and Jurisprudence* (1901), Vol. 1, pp. 334–335.

highest importance. In the absence of a son who could succeed his father in the fulfilment of this sacred duty, a substitute had to be found. Thus the institution of adoption and a limited freedom of testation developed in order to enable Roman citizens to fulfil their duties to the gods and the community as a whole. In a monastery of the Middle Ages life was sufficiently complex to require government and assignment of functions. Rules, therefore, had to be devised how best to assure the achievement of the common purpose—the glorification of God and the maintenance of the community. Every member was anxious to contribute his share, and the more onerous and burdensome the task, the higher the honour which it conferred was deemed to be. The function of such a law is the co-ordination of efforts,[15] and this feature is the characteristic of a law which is diametrically opposed to an extreme society law. The law of power and the law of co-ordination form the two antipodes which legal genius has devised. While the one embodies strong ideological elements, in view of average human nature, the other largely remains an unfulfilled aspiration and, to that extent, utopian.

THE FUNCTIONS OF LAW IN HYBRID GROUPS (THE LAW OF RECIPROCITY)

In reality societies and communities show features which blur the border line between the two groups. Correspondingly, the law of power partakes of the characteristics of the law of co-ordination, and the law of co-ordination borrows from its opposite type. Even within a society motivated by typical society intentions, such an intermediate and ambivalent stage may arise if the members of the society happen to be of approximately equal strength. Then a situation exists in which a third type of law, the law of reciprocity, comes into its own. In the words of Aristotle, 'amongst equals whatever is fair and just ought to be reciprocal, for this is equal and right; but that equals should not partake of what is equal, or like to like, is contrary to nature'.[16] This state of affairs in which the equilibrium of power makes it possible for power to be ignored seems to correspond to the typical nature of man. It has produced the

[15] See G. Radbruch, *Rechtsphilosophie* (1932), pp. 50ff.
[16] *Politics*, 7, 3.

earliest form of legal transactions—barter. Both sides are content if they are convinced that they have received more than, or at least as much as, they have given. This implies that man is not predominantly altruistic but is prepared to act on the basis of the principle *do ut des,* to consider the application of this principle to his own affairs as just and fair, and to come to an understanding with his fellow-men on the standards by which the *quid pro quo* is to be determined. In exceptional circumstances *homo juridicus* is willing to give more than he takes. This may be due to inferiority of power, mistake or fraud. Then reciprocity is achieved in a merely formal sense. In the first case, the lack of equilibrium is compensated for by a realisation of what might have happened if agreement had not been reached or the law of power had been disobeyed. In the second case, reciprocity is assumed but in reality does not exist and has to be restored by special remedies. These two examples represent typical society constellations. Willingness to forgo actual reciprocity may also be due to voluntary self-limitation and self-denial. Then reciprocity in a spiritual sense is achieved by the consciousness of such sacrifice and its acknowledgment by the community. Such an attitude is typical of the law of co-ordination.

The law of reciprocity may be considered as a compromise between the laws of power and of co-ordination, between the extremes of brutal domination and superhuman self-negation. While it is characteristic of groups which themselves are hybrids, it may be used intentionally by communities for the regulation of affairs which, from the point of view of the community as a whole, are considered to be peripheral. As is obvious from systems of private law which require *causa* or consideration or discourage gratuitous contracts, groups claiming to be communities employ within limits the egotistical levers of social action: 'Every one has his special interest in view, no one thinks of the purpose, and yet this purpose is perhaps furthered in this way more surely and quickly than if it had been pursued by the Government directly'.[17]

Thus, mankind has developed three basic patterns of law, and their working principles are power, co-ordination and reciprocity.

[17] R. von Jhering, *Law as a Means to an End,* trans. (1913), p. 32.

The value of this typology depends on a simple test. Does it provide any additional insight into the phenomenon of law? It would surpass the scope of a tentative paper to attempt more than to sketch the potentialities inherent in this approach to problems of jurisprudence.

THE THREE TYPES OF LAW AND SELECTED PROBLEMS OF TRADITIONAL JURISPRUDENCE

Any 'novel' approach to questions of jurisprudence does more harm than good if it aspires to exclusiveness. There are problems of legal theory on which more light is thrown by the use of the analytical, comparative, or historical methods than by a sociological approach. Yet the investigation of law as a social phenomenon may assist in the fuller understanding of some of these problems.[18]

1. *The Definition of Law.* The position has not essentially changed since Kant wrote: 'The jurists still seek a definition of their concept of law'. They have defined law by reference to its substance: as truth, reason, or authority; they have tried to comprehend it as an aggregate of laws: as rules of conduct, as the sum total of decisions, or as the prophecy of official action; they have conceived it as synonymous with the legal order or in terms of canons of value; they have identified it with the judicial process.[19] It is possible to find definitions of law which apply to society and community laws alike. Yet, of necessity, such definitions must remain rather abstract. Nevertheless, they indicate something real: the elements common to law in all human associations. The same cannot be said of all these definitions, *e.g.*, of those which identify law either with *veritas* or *auctoritas*. It might pay to investigate the closer relationship between the *auctoritas* conception of law and society types of law and between the *veritas* conception of law and highly integrated communities. It is tentatively suggested that, the more

[18] I hesitate to apply the three types of law to primitive law if by this is understood law before its separation—at least in part—from basically pre-rational group life, especially religion. Pending further research on the subject, I tend to limit the attribution of rational forms of behaviours to periods of legal evolution in which law may be equated without undue artificiality with either *veritas* or *voluntas*.

[19] Cf. R. Pound, '*More about the Nature of Law*', in *Legal Essays in Tribute to O. K. McMurry* (1935), pp. 115–117, and W. Friedmann, *Legal Theory* (1944), pp. 415–416.

a group is organised on the pattern of a society, the more law may rightly be defined as 'the word of him that by right hath command over others',[20] and the more a group may claim to be a community, the truer it is to call law 'the force or tendency which makes for righteousness'.[21]

2. *Contents of the Law of Nature.* The traditional exposition of the law of nature is limited to the statement of vague characteristics of natural law: that it is unwritten, that it has actual validity, that it postulates an idea of law which can be used as a measuring rod of positive law, and that it comprises natural norms in accordance with which social behaviour obviously should be regulated.[22] Once writers attempt to express their ideas in more concrete terms, their statements are flatly contradictory. Two instances may illustrate this point. According to Hobbes, 'seeing then to the offensiveness of man's nature one to another, there is added a right of every man to everything, whereby one man invadeth with right, and another with right resisteth; and men live thereby in perpetual diffidence, and study how to preoccupate each other; the estate of men in this natural liberty is the estate of war'.[23] The opposite thesis is upheld by Pufendorf: 'Now it is one of the first principles of natural law that no one unjustly do another hurt or damage, as well as that men should perform for each other the duties of humanity, and show especial zeal to fulfil the matters upon which they have entered into particular agreements'.[24] While Hobbes pictures the state of nature as society, if not anarchy, Pufendorf conceives it as a community. Their conclusions, therefore, regarding the *ordo rerum* are necessarily diametrically

[20] Hobbes, *Leviathan,* Part 1, Chap. 15.

[21] E. Jenks, *The New Jurisprudence* (1933), p. 1.

[22] To show that it is necessary for jurisprudence to concern itself with this question, it is only necessary to refer to the strong influence of natural law on the practice of Courts in Anglo-Saxon countries and on the Continent, a fact which positivists should be the last to ignore. Cf. *e.g.,* Lord Wright's *dictum* in *Rose* v. *Ford,* [1937] A.C. 826, at 852: 'It was not indeed, even before the Act of 1934, pertinent or even sensible to refer to the case of a man suing for his own death. Literally, not the common law, but the law of nature, prevented that even being imagined. . . . Natural reasons still operate to prevent a man from suing for his own death'. See also Charles G. Haines, *The Revival of Natural Law Concepts* (1930), and J. Stone, *The Province and Function of Law* (1947), pp. 215ff.

[23] *Elements of Law,* Part 1, Chap. 14, p. 11.

[24] *De Jure Naturæ et Gentium,* Book 8, Chap. 6, s. 2.

opposed to each other. In order to do justice to these doctrines, it is necessary to distinguish between theories on natural law appertaining to a society and those which work on the assumption of a community proper. Then the apparent discrepancies disappear, and it will be found that these theories contain valuable intuitions on the nature and functions of community and society laws.

3. *The Meaning of Justice.* Justice as the central value in any system of natural law has suffered in its scientific treatment from the same methodological shortcomings as the exposition of natural law doctrines in general. If the essence of justice is defined as *ius suum cuique tribuendi* or as the equal treatment of equals, it depends entirely on the structure of the human association in which it is to be meted out, what is due to every one and which members of the group are to be considered as equals. The decisive problem is the desirable degree of disregard for an actual inequality, and what is just in a society may be a travesty of justice in a community. It is futile to discuss justice in the abstract without reference to the purpose and structure of a given group. As equity is nothing but the application of principles of justice to concrete cases, the same considerations equally apply to discussions on the nature, functions, and contents of natural equity. There was wisdom in the name which Jaroslav the Just (A.D. 1015–1050) gave to his code. He called it *Pravda Russkaya*—'Russian Truth'.

4. *The Controversy regarding the Autonomous or Heteronomous Character of Moral and Legal Norms.* In the perennial discussions on the difference between morality and law it has been frequently asserted that moral rules are autonomous, whereas legal norms are heteronomous. Reference to the social background against which both sets of rules develop might have suggested that the criterion which divides law from morality cannot be found in this alleged difference. Actually, both law and morality are autonomous *and* heteronomous. Both are social phenomena which cannot be understood in the abstract without reference to the group within which they are to be applied. Morality is not entirely autonomous; for the *forum internum* is more strongly conditioned by its social environment than is commonly imagined. Conversely, law is not entirely heteronomous and requires more than blind obedience. The degree

of law obedience cannot be measured by the relatively few cases which lead to litigation but must be gauged from the untold number of cases which do not arise, because the validity of the law is commonly acknowledged. Here again a connection exists between the three types of law and its autonomous *and* heteronomous character. The more a legal system is a community law, the stronger is its autonomous character and *vice versa*.

5. *The Legal Character of Law in Totalitarian States.* For the extreme positivist the problem of the legal character of the law in totalitarian states does not arise. Their laws emanate from law-givers, they are applied by the courts, they are obeyed in the majority of cases, and, if not, sanctions are put in operation. From the point of view, however, of a doctrine of natural law such as the one professed by the Roman Catholic Church, many statutes promulgated in totalitarian states are nothing but *corruptelæ legis* and, therefore, null and void. Though sociological jurisprudence cannot answer the question in the terms put by the naturalists, it can bring out specific features of totalitarian law which, otherwise, remain unobserved. For a proper understanding of these legal systems, it is essential to distinguish the various types of law which totalitarian rulers attempt to combine. They frequently apply principles which pertain to the law of co-ordination. They, however, give it an arbitrary and exclusive twist which subjects certain groups within their sway to an undisguised law of power. Beyond this, the ruling élite considers itself to be entitled to suspend the community law with regard to members of the *Herrenvolk* itself in favour of a law of power which is incompatible even with the maintenance of a closed community, limited to the chosen people.

6. *The Legal Character of International Law.* Is international law law or is it merely positive morality? How can a system claim legal character if it lacks all or some of the customary attributes of municipal law, legislative organs, courts, and sanctions? Questions of this kind uncritically take it for granted that there is only *one* type of law—the law as we know it within the modern state. The sterile discussions which centre around this problem ignore the vital difference between the social background of municipal and international law. They, therefore, either lead to euphemistic and unrealistic assertions of the identical character of municipal and international law or to a

resigned admission of inexplicable differences which deprive international law of its legal character. Actually, international law is a curious mixture of the three basic types of law. As the rule of law in the international society is conditioned by the arbitrament of force, international law is primarily a law of power. In situations in which the threat of force is no longer available, because states have resorted to this ultimate means of pressure, or in relations which, within a system of power politics, are peripheral, there is wide scope for the application of the law of reciprocity. As is evident from efforts such as the International Refugee Organisation or the International Children's Emergency Fund, there is even room within international law for a timid assertion of the law of co-ordination. While it would lead too far here to elaborate these points,[25] the fact that this typology may with ease be applied to problems both of municipal and of international jurisprudence indicates that the three types of the laws of power, reciprocity and co-ordination are of general applicability in the realm of legal theory.

[25] Cf. the articles in n. 2 above. See also G. Williams, *International Law and the Controversy concerning the Word 'Law'*, 22 *British Yearbook of International Law* (1945), pp. 146ff., and G. W. Keeton, *The Elementary Principles of Jurisprudence*, 1949, pp. 246ff.

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8

THE PHILOSOPHY OF THE COMMON LAW

RICHARD O'SULLIVAN

FIVE and thirty years ago a young student of the Inns of Court caught sight, in the Library of the Middle Temple, of a book entitled *The Philosophy of the Common Law.* Not without a sense of excitement he took the book from the shelf and looked inside. It was by a distinguished lawyer, Herbert Broom, of the Inner Temple, who for more than twenty years (1852–1875) had lectured on common law to the four Inns of Court. The Table of Contents revealed the scope of the little volume: What are the ingredients of a simple contract? What is the meaning of the word 'tort'? What is a crime? In what circumstances is a person criminally liable for death caused by the kick of a vicious horse? In what circumstances is it negligence to keep a dangerous bull? What are the duties owing by a traveller to a railway company?

Now, one can scarcely deny that this last question: What are the duties owing by a traveller to a railway company? is one proper to be considered by a professor of philosophy. Apart from this question, and a solitary citation from the Book of Proverbs, 'Though hand join in hand, the wicked shall not be unpunished', the work of Dr. Broom had not even the most distant reference or relation to any philosophy of law or of the common law, as the young student understood (or imagined) the meaning of the term. The book had no *Weltanschauung.* Perhaps there was no philosophy of the common law? Perhaps, like Roman legal science even in the classical period, English legal science was 'a professional science, which stuck to its last, and left philosophy to the philosophers'?[1] In that case in England and in all the countries of the common law, as in Rome,

[1] Fritz Schulz, *History of Roman Legal Science,* p. 135. Post-classical jurisprudence is said to have been one channel by which Greek dialectic flowed into medieval jurisprudence. The other channel was medieval scholasticism, *ibid.,* p. 296.

the student, on call to the Bar, would be plunged straight into practice, where he would be faced with the ever recurrent question: What, on the facts stated, ought to be *done*? What he would learn by slow steps would be neither a philosophy of law, a theory of legal method, legal history, nor comparative law, but simply the art of deciding on the concrete case. And his teacher would not be the school of law, but the rough and tumble of practice. In the Roman phrase, he would 'learn how to fight on the field of battle'.[2]

The students of the Inns of Court in 1914 had indeed to learn 'how to fight on the field of battle'. In 1918 the battle was won. The world had now been made safe for democracy. The leaders of our democracy undertook (it is their habit) to make a country fit for heroes to live in; and succeeded beyond all their expectations.

Our student of the Inns of Court 'plunged straight into practice', putting aside all thought of a philosophy of the common law; of 'the law of nature of reasonable creatures, or the law of reason as it is commonly called by those that are learned in the laws of England'. Doubtfully, and only provisionally, he accepted the assurance of Professor Winfield that the notion of a law of nature or of reason is 'a topic which has long since had its brains knocked out'.[3]

The challenge of the time was not merely to the existence of a philosophy of law: it was a challenge to all reason, to all philosophy. 'The idea of reason as the power which apprehends ultimate first principles persists in legal philosophy', wrote John Dewey, 'The original ground for this conception of reason has now been destroyed'.[4] The validity of reason had been attacked and undermined by the psycho-analysts who were sure that the

[2] *Ibid.*, p. 58. In his little volume *La Philosophie des Lois*, Ed. Alsatia, Paris, 1946, p. 11, R. P. Sertillanges speaks of '*le semi-empirisme du droit romain, droit rationnel dans sa structure, dans sa contexture, mais dominé par un impérialisme du dedans et du dehors, par une sorte de volonté de puissance à la façon de Nietzsche: domination de soi-même et d'autrui sans justification rationelle suffisante*'.

[3] Professor Winfield has since described 'the law of reason' or 'the law of nature' as 'a vision of some ethical abstraction' to which the founders of the common law 'wished to make the law conform'. Pollock, *Principles of Contract*, 12th ed. (Winfield), p. 291. Professor Kocourek has likewise written of 'the world's greatest legal illusion, meaning of course natural law'. Elsewhere he says that 'Natural law and an ultimate standard of justice . . . are examples of illusion on illusion'.

[4] *The Theory of Inquiry*, 1938, p. 209.

real sources of thought and action lay in the unconscious; and by the followers of Marx, who were equally sure that ideas of philosophy and religion and the rest were mere secondary manifestations of material and economic forces.

The dual attack—from within and from without—upon reason and upon what was called 'the traditional and known technique of the common law'[5] stirred the professional loyalty and renewed the interest of our student in what Herbert Broom had called 'the philosophy of the common law'. His interest was stimulated by the statement of Sir James Fitzjames Stephen that 'Chief Baron Gilbert's work on the Law of Evidence is founded on Locke's Essay on the Human Understanding much as my work is founded on Mill's Logic'[6]; and by the declaration of Lord Mansfield that jurisprudence is 'a rational science founded upon the universal principles of moral rectitude but modified by habit and authority'. This declaration was in line with the teaching of Bracton on Jurisprudence five centuries before: '*Ethicae vero supponitur quasi morali scientiae quia tractat de moribus*'. And Kenelm Digby, he found, in his *History of Real Property,*[7] had called attention to the contrast between the handling of metaphysical ideas in relation to 'uses' by the common lawyers and 'the more enlightened system which had been constructed by a succession of ecclesiastical chancellors'.

Logic, ethics, metaphysics. 'Law is the place where life and logic meet'. Life and logic: law began to appear as one of the biological sciences; as the biology of social life.

There came to mind the language in which, in the seventeenth century, Sir Henry Finch gave '*un description del common ley d'Angleterre selonque les rules de l'art*'.[8] Beginning, like his predecessors, with an examination of the law of nature and the law of reason, he declares that the rules of reason are of two sorts: some are taken from 'foreign' learning; the rest are proper to the law: 'Of the first sort are the principles and sound conclusions, out of the best and the very bowels of divinity, grammar, logic; also from philosophy, natural, political,

[5] This technique was said by Walter Wheeler Cook in an article in the *American Bar Association Journal* (June, 1927), to be 'as grotesquely inadequate for legal purposes as the childish mechanical notions of the nineteenth century have shown themselves to be in the field of physics'.

[6] Stephen, *Digest of the Law of Evidence,* 1881, p. xl.

[7] Digby, *History of Real Property,* 4th ed., pp. 342–343, 368.

[8] Finch, *Nomotechnica,* ed. 1627, p. 6.

economic, moral, though in our Reports and Year Books they do not come under the same terms. Yet the things we find are the same, for the sparks of all the sciences in the world are raked up in the ashes of the law'.

'Deus bone!' exclaimed Sir Thomas Smith in an earlier time, excited by the skill in disputation shown by the students of English law in their schools in London: *'Etiam cum quid e philosophia theologiave depromptum in quaestione ponatur, Deus bone! quam apte, quamque explicate singula resumunt, quanta cum facilitate et copia, quanta cum gratia et venustate, vel confirmunt sua, vel refellunt aliena. Certe nec dialecticae vim multum nec eis desideres nec eloquentiae splendorem'.*[9] And the Cambridge Professor of Roman civil law expressed the hope he might again be able to attend the circles and disputations at the Inns of Court. 'His heart was in the right place', says Maitland, 'in a school of living law'. Let us recall the description Maitland gives elsewhere of the lay lawyers of London: 'We see at Westminster a cluster of men which deserves more attention than it receives from our unsympathetic, because legally uneducated, historians. No, the clergy were not the only learned men in England, the only cultivated men, the only men of ideas. Vigorous intellectual effort was to be found outside the monasteries and the universities. These lawyers were worldly men, not men of sterile caste—they marry and found families, some of which become as noble as any in the land; but they are in their way learned, cultivated men, linguists, logicians, tenacious disputants, true lovers of the nice case, and the moot point. They are gregarious, clubable men, grouping themselves in *hospices* which become schools of law, multiplying manuscripts, arguing, learning and teaching, the great mediators between life and logic, a reasoning, reasonable element in the English nation'. And let us add the testimony of Professor Lévy-Ullmann, that in all the centuries before the sixteenth century, the Law Schools of London, the Inns of Court were 'the University and Church Militant of the Common Law'.[10]

[9] Cited Maitland, *English Law and the Renaissance, Anglo-American Legal Essays*, Vol. 1, p. 200.

[10] Lévy-Ullmann, *The English Legal Tradition*, p. 87. Compare the letter of Erasmus to Faber, *apropos* Sir Thomas More, *'Natus est Londini, in qua civitate multo omnium celeberrima natum et educatum esse apud Anglos nonnulla nobilitatis pars habetur'.*

Law then, the common law of England, was throughout the whole period of its creative life and power, in touch with, sensitive to, and nourished by the tradition of classical and Christian philosophy and theology.[11] And here it may be lies the explanation of the claim made by Mr. Justice Holmes that the common law of England is 'a far more developed, more rational, and mightier body of law than the Roman'.[12]

Let us glance at some of the great names and the texts of the common law. Of the book that is called *Glanvill* (the author of which is believed to have been a Christian bishop) let us just observe that it contains already the great concept of the free and lawful man, the *'liber et legalis homo'*, which, in a way scarcely consistent with Marxist teaching, was going to transform the whole social order. Of Henry of Bracton, Chancellor of the Cathedral of Exeter, let us retain, even without its context, a sentence that will echo through centuries of English and American history and that will be heard at Nuremberg: *'Rex est sub Deo et sub lege'*: 'The king is under God and the Law'. And, in passing, let us note some of the sources that Bracton used: apart from the decisions of Patteshull and Raleigh, which he had before him, there are the Old and the New Testament, the works of Ambrose and Augustine, the Roman civil law, the Decretum of Gratian, the Decretals of Gregory IX, the works of Raymond of Pennafort and of Azo of Bologna. And observe how, with Azo, he adapts the phrase of the civilians, *'Quod natura omnia animalia docuit'* to read *'Quod natura, id est ipse Deus, omnia animalia docuit'*. Take, again, *The Mirror of Justices,* a

[11] I am not unaware that on the final page of Pollock and Maitland, *History of English Law,* it is said, of the period 1154–1272, 'that it was the critical moment in English legal history and therefore in the innermost history of our land and race.... Those few men who were gathered at Westminster round Patteshull and Raleigh were penning writs that would run in the name of kingless commonwealths on the other shore of the Atlantic Ocean; they were making right and wrong for us and for our children'; and that elsewhere (Pollock and Maitland, *op. cit.,* Vol. I, pp. 132–133) it is said, 'It is by popish clergymen that our common law is converted from a rude mass of customs into an articulate system and when the popish clergymen, yielding at length to the Pope's commands, no longer sit as the principal justices of the King's Court, the creative age of our medieval law is over'.

[12] Holmes, *The Common Law,* p. 210.

[13] See *The Sources of Bracton on Kingship,* by Fritz Schulz, *English Historical Review,* LX. (1945), pp. 136–176. The introduction of the words *id est ipse Deus* would, *semble,* make the observance of the rules of natural law a matter of conscience among reasonable creatures.

'variegated, tesselated book' of the early fourteenth century, a book of little or no authority, let me say. It was written, so it is said, by one Andrew Horn, a fishmonger of the City of London.[14] Yet it contains some passages that are perhaps worth while. The author protests that it is an abuse that villeins and others should still be considered personally unfree. He says elsewhere, hovering between truism and heresy, that 'a clerk has no more right to sin with impunity than has a layman'. And he says again in his quaint Norman-French: '*Abusion est a tenir escape de prisoner ou debruiserie del Goale pur peche mortel, car cet usage n'est garant per nul ley, ne in nul part est use forsque in cest Realme et en France, eins est leu garrantie de ceo faire per la ley de nature*!' One suspects that our fishmonger had been reading, without perhaps fully understanding, the *Summa Theologica* of St. Thomas.[15]

In the *De Laudibus Legum Angliae,* in the *De Natura Legis Naturae,* and in the *De Monarchia,* Sir John Fortescue writes as a declared disciple of Aquinas.[16] The first two were written in Latin. The *De Monarchia* is the first law book that was written in English, on the English Constitution. The first chapter has to do with 'the deference bi twene *dominium regale* and *dominium politicum et regale*', that is, broadly speaking, the difference between absolute monarchy and constitutional monarchy. The opening sentences run: 'There bith two kyndes off kyndomes, of the wich that on is a lordship callid in laten *dominium regale,* and that other is callid *dominium politicum et regale.* And thai diversen in that the first kynge may rule his peple bi such lawes as he makyth hym self. And therefore he may sett uppon thaim tayles and other imposicions such as he wol hym self, withowt thair assent. The secounde kynge may not rule his peple by other lawes than such as thai assenten unto.

14 'What then shall we say of this book? and what shall we call its author? Is he lawyer, antiquary, preacher, agitator, pedant, faddist, lunatic, romancer, liar? A little of all perhaps, but the romancer seems to predominate'. Maitland, *The Mirror of Justices,* Selden Society, Introd., p. xlviii.

15 S.T. IIa, IIae, Q. 69, A. 4 ad 2.

16 Of his other works, the 'beautiful and touching Dialogue between Understanding and Faith' bears witness to 'the vivid personal religion of a busy man of politics. His religion—the religion of a layman—rings as true as the cloistered devotion of Thomas à Kempis': Miss A. E. Levett in *Social and Political Ideas of the Renaissance and the Reformation,* 1925, pp. 83–84.

And therefore he may sett uppon thaim non imposicions withowt thair owne assent. This diversite is wel taught bi Seynt Thomas in his boke wich he wrote ad regem Cipri *de regimine principum'*.[17] The views of Fortescue correspond broadly with the view of Bracton: The King is under God and the law. The development of a parliamentary regime in the interval between the thirteenth and the fifteenth centuries makes Fortescue more conscious of the popular element in the constitution. And here we may observe that the writs of summons to Peers and to Parliament *'ad deliberandum et consentiendum et faciendum'* were phrased in terms that were familiar to the psychology and the philosophy of the medieval schoolmen. Until the Reformation, the clerks of Parliament and of Convocation were regularly schoolmen. Indeed, according to the current edition of May's *Parliamentary Practice,* the whole theory of representation and consent 'are traced to an ecclesiastical origin by attributing to the Lateran Council of 1215 the motive source, to the practice of the English Church Councils from 1226 onwards the precedents, and to the ecclesiastical leaders the principle applied first in connexion with taxes on 'Spiritualities' that taxation demands both representation and consent. . . . The feudal doctrine of consent to taxation lacked the element of representation. The Church affirming the principle *quod omnes tangit ab omnibus approbetur* linked the two practices together and so laid the foundation of the power of the Commons. Even more important was the contribution of the leaders of the Church in England, both in principle and in practice, to the union of the different estates of the realm into one single *communitas regni'*.[18]

Though the influence of Aquinas on Sir John Fortescue was (in Dr. Hazeltine's phrase) profound, our author was not so limited in his learning as not to be able to vouch Aristotle or Augustine to warranty if occasion served. He used the *Ethics* of Aristotle as authority for the proposition that the natural law has the same force among all men. All the great common

[17] The distinction between *dominium regale* and *dominium regale et politicum* is a familiar doctrine with Aquinas. See *e.g.,* S.T. I, Q. 81, A. 3. *'Anima quidem corpori dominatur despotico principatu, intellectus autem appetitui politico et regali'.* Cf. Ia IIae, Q. 17, A. 7; Q. 56, A. 4; Q. 58, A. 2. And see Demongeot, *Le Meilleur Régime Politique selon Saint Thomas,* p. 41, where a series of citations are given from his *Commentary on the Politics of Aristotle,* and elsewhere.

[18] May, *Parliamentary Practice* (1946), p. 7.

lawyers from Henry of Bracton to Lord Mansfield were of one mind on the matter.

Like Fortescue, Sir Thomas More, twice Reader at Lincoln's Inn, had an extensive knowledge of classical and Christian philosophy and jurisprudence. As a boy of 23, lately called to the Bar, he gave at the Church of St. Lawrence Jewry a series of lectures on the historical and philosophical aspects of the *de Civitate Dei* of Augustine, which all the chief learned men of the City of London attended. In the *Utopia* which takes its pattern from Plato, he defends *in his own name* the institution of property with arguments that are identical with those used in the *Summa Theologica* of Aquinas.[19] His letter to Dorpius, displays an extensive and intimate acquaintance with the course of Aristotelian studies through the centuries.

Contemporary with Sir Thomas More in the office of Master of Bequests, and in controversy with him on a point of theology was Christopher St. Germain, author of the *Doctor and Student,* which was to exert an influence on English law and equity for a period of more than two centuries. The book is in form a dialogue between a Doctor of Divinity and a Student of the common law. In its detailed teaching it illustrates according to Vinogradoff 'a process of indirect reception into England of the Canon Law'. In its broad outline St. Germain declares in the classical manner of the schoolmen that the world is ruled by the eternal law of God, Creator and Governor of the Universe, Who moves all things that are made to a good end; and by 'the law of nature of reasonable creatures or the law of reason as it is commonly called by those that are learned in the laws of England'. This law of nature or of reason is the first ground of the law of England. (In his enumeration of the grounds of the law of England, statute occupies the sixth place.) In the main the exposition of St. Germain follows the pattern laid down in the classical treatise on law by St. Thomas Aquinas. But he borrows not directly from Aquinas but indirectly through John Gerson, Chancellor of Paris.[20] Now Gerson was a nominalist and a follower of Ockham, who taught that the principle of law was not Reason but Will. And so we

[19] S.T. IIa IIae, Q. 66, A. 1. Cf. *Utopia,* Everyman edition, p. 45.
[20] Thus, for example, the substance of Chap. 3 of the *Doctor and Student* is taken bodily from the corpus of S.T., Ia IIae, Q. 91, A. 4.

find in St. Germain a certain hesitation on this capital matter, an inclination to say that the eternal law, for instance, is rather the divine will than the divine wisdom ruling all things to a good end.[21] *'Recht ist nicht recht'*, Leibnitz will say, *'weil Gott es gewollt hat sondern weil Gott gerecht ist'*.

The great texts of the common law thus reveal the constant influence of the classical and Christian philosophers, of Aristotle, Augustine, Aquinas, Ockham. The same influence is revealed in the Year Books and in the Reports. In Plowden there is a detailed reference to the doctrine of Aristotle in relation to natural law.[22] In the same volume is the Report of the well known case of *Hales* v. *Petit*,[23] in which the Common Bench declared that suicide (in this case the suicide of one of the King's judges) is an offence against nature, against God, and against the King.

(1) Against nature: because it is contrary to the rule of self-preservation, which is the principle of nature, for every living thing does by instinct of nature defend itself from destruction; and then to destroy oneself is contrary to nature, and a thing most horrible.[24]

(2) Against God, in that it is a breach of his commandment 'Thou shalt not kill'; and to kill oneself, by which act he kills in presumption his own soul, is a greater offence than to kill another.

(3) Against the King, in that hereby he has lost a subject and . . . he being the head has lost one of his mystical members.[25]

[21] Vinogradoff, *Reason and Conscience in the Sixteenth Century Jurisprudence, Collected Papers*, Vol. 2, p. 192 (*Doctor and Student* (Latin text) 1528, f. 4–4b; Gerson, *Definitiones Terminorum, Opera Omnia* III, 26A. Gerson refers to the *Summa* of Thomas Bradwardine in connexion with this difficult matter. I owe these references to the courtesy of Professor Plucknett).

[22] *Plowden's Reports*, 1599 ed., pp. 303–304. In Hale, *Pleas of the Crown*, Vol. 1 (1736), are to be found references to Scotus, Maimonides, and the Decretals.

[23] 4 & 5 Eliz. Plowden, p. 261. The case had to do with suicide by drowning and is said to have supplied the basis of the reasoning on suicide in the gravediggers' scene in Hamlet.

[24] Cf. the line in Shakespeare, 'Richard loves Richard, that is, I am I'. *Richard III*.

[25] The Mysticism of Kingship and at a later time of Parliament is one of the curious phenomena of English politics. See *e.g.*, Pickthorne, *Early Tudor Government, Henry VIII*, pp. 153, 166, 341; Plucknett, *Concise History of the Common Law*, 4th ed., p. 460.

The frame and the terms of the judgment clearly reflect the threefold argument against suicide in the *Summa Theologica.*[26]

Again: the celebrated dictum of Brian, Chief Justice: '*Comen erudition est que l'entent d'un home ne sera trie, car le diable n'ad conusance de l'entente d'home',* states a principle of theology which is to be found in the *Summa.*[27]

Once more, the distinction that is drawn between the private and public knowledge of the judge in *Partridge* v. *Strange*[28] is an echo of the discussion in Aquinas, where it is said that it is the duty of a judge to base his judgment on evidence brought before him as a public person, and not on information he may have as a private individual.[29]

Finally, in the *Year Book 18–19, Edward III,* a discussion among the judges (in a case where, a tenant for life having made default, the remainder man prayed to be received) reflects the debate among the theologians as to whether the principle of law is to be found in Reason or in Will.

Sharshulle, J., referred to precedents, but added: '*nulle ensaumple est si fort come resoun'.* The law was very unsettled, and the report concludes:—

THORPE. I think you will do as others have done in like case; or else we do not know what the law is.

HILLARY, J. *Volunté des justices.*

STONORE, J. *Nanyl: ley est resoun.*

Reason or Will: Bracton had spoken his mind long ago. *Non est enim Rex ubi dominatur voluntas et non lex.* And Thomas Littleton added his voice in the words which form the epilogue to his *Tenures: Lex plus laudatur quando ratione probatur.* The choice of the Inns of Court lay with Aquinas rather than with Ockham. 'The common law', Sir Edward Coke will say, 'is the perfection of Reason'. And here it is proper to add that the common law owes nothing to any of the German philosophers. If only for this reason, one may record the tribute of von Ihering to Aquinas: 'That great mind had correctly recognised the realistic-practical element of morals as well as the historical one . . . I ask myself in astonishment how

[26] IIa IIae, Q. 64, A. 5.
[27] S.T. I, Q. 57, A. 4; Maritain, *Freedom in the Modern World,* p. 25.
[28] (1553), Plowden, p. 83.
[29] Aquinas, S.T., IIa IIae, Q. 67, A. 2. For a contrary opinion see *The Medieval Idea of Law,* by W. Ullmann, pp. 126–128.

it could have been possible for such truths, once uttered, to be so completely forgotten by our Protestant scholars? From what errors might they not have saved themselves, if they had borne those truths in mind. For my part, I might perhaps not have written my book at all, if I had known them, because the fundamental thoughts I was most anxious to express are to be found uttered with perfect lucidity and in the most significant form by that giant thinker'.[30]

There is then a *Weltanschauung*, a philosophy of the common law. It is the traditional philosophy, everywhere alive, of classical and Christian jurisprudence. And here we may perhaps observe that the common law of England is the only great system of temporal law that came out of the Christian centuries.[31]

The ruling philosophy of the common law is condensed and reflected in the oath that the Serjeants took: 'to give counsel according to law, that is it say, the law of God, the law of reason, and the law of the land'. In 1468, the Chancellor told the House of Lords that Justice was 'ground, well and root of all prosperity, peace and public rule of every realm, whereupon all the laws of the world have been ground and set, which resteth in three, that is to say, the law of God, the law of nature, and positive law'.

In the conception of the common law, man has thus an immediate relation, through Reason and Conscience, to God.[32] In the philosophy of Aquinas, man belongs to God to the whole extent of his being and existence. Though he is *by nature* a political animal, he does not belong to the political order or to the State to the whole extent of his being and of all that is his.[33]

A duty to a higher power confers a right against a lower power. If we owe a duty to God, then we have rights against

[30] Von Ihering, *Der Zweck im Recht*, 4th ed. (1905), Vol. 2, s. 125, (161), Anmerkung 2.

[31] It is perhaps not impertinent to observe that the *Institutes*, the *Code* and the *Digest* of Justinian were severally published 'in the name of our Lord Jesus Christ'.

[32] A great Englishman, John Henry Newman, has said that conscience is 'the aboriginal Vicar of Christ' in us. Cf. Acts iv. 18–19, 'And they called them, and commanded them not to speak at all nor teach in the name of Jesus. But Peter and John answered and said unto them, Whether it be right in the sight of God to hearken unto you more than unto God, judge ye'.

[33] S.T. Ia IIae, Q. 21, A. 4, ad 3. '*Homo non ordinatur ad communitatem politicam secundum se totum, et secundum omnia sua . . . sed totum quod homo est et quod potest et quod habet ordinandum est Deo*'.

the State. The principle is recognised in the common law, and was stated by Sir Hartley Shawcross in his opening speech at Nuremberg: 'Political loyalty, military obedience, are excellent things, but they neither require nor do they justify the commission of patently wicked acts. There comes a point where a man must refuse to answer to his leader if he is also to answer to his conscience'. In the speech he made to his judges after verdict, Sir Thomas More said: 'Ye must understand that, in things touching conscience, every true and good subject is more bound to have respect to his said conscience and to his soul, than to any other thing in all the world beside; namely, when his conscience is in such sort as mine is, that is to say, where the person giveth no occasion of slander, of tumult and sedition against his prince, as it is with me'. 'I die', said the most illustrious of the common lawyers upon the scaffold—'I die, the King's good servant, but God's first'.

'Render to Cæsar the things that are Cæsar's'. The political theory of the Middle Ages, Dr. Carlyle tells us, was profoundly affected or rather controlled by certain conceptions, the first of which, the principle of the autonomy of the spiritual life, assumed the form of the independence of the spiritual authority from the control of the temporal: 'Behind the forms of the great conflict (*i.e.*, between papacy and empire, church and state) we have to recognise the appearance in the consciousness of the civilised world, of principles new and immensely significant. For behind it all, there lies a development of the conception of individuality or personality, which was unknown to the ancient world. . . . Men have been compelled to recognise that the individual religious and moral experience transcends the authority of the political and even of the religious society, and that the religious society as embodying this spiritual experience cannot tolerate the control of the State'.[34] '*Persona significat id quod est perfectissimum in tota natura*'.[35] 'Our modern theories', says Maitland, 'run counter to the deepest convictions of the Middle Ages, to their whole manner of regarding the relation between Church and State. . . . The

[34] *Medieval Political Theory,* Vol. 3, pp. 6–9. The principle of the independence of the spiritual authority is guaranteed in the first clause of Magna Carta, '*quod ecclesia anglicana libera sit et habeat omni jura sua integra et libertates suas illesas*'.

[35] S.T. I, Q. 29, A. 3.

State has its King or Emperor, its laws, its legislative assemblies, its courts, its judges. The Church has its Pope, its prelates, its councils, its laws, its courts. . . . Obviously, while men think thus, while they more or less consistently act upon this theory, they have no sovereign in Austin's sense. Before the Reformation, Austin's doctrine was impossible'. And Hobbes' likewise.

Apart from this balance and distribution of power between Church and State, the recognition of the existence and operation of an objective system of principles and rules of natural law afforded a fresh guarantee of what men are now beginning to call human rights and fundamental freedoms. 'Natural law', declared Stephen Langton, 'is binding on princes and bishops alike: There is no escape from it. It is beyond the reach of the Pope himself, who could not dispense from it, seeing that the fabric of any form of society is bound up with it'.

These principles and rules of natural law are rooted in the order of the world and in a view of man as a part of that order; and in a study of the inner constitution of man, of psychology and of ethics and the metaphysical foundations of our being. The observation of external things reveals in the universe a related series of orders: the mineral, the vegetable, and the animal order, each serving its own end, and at the same time subserving each higher order, and all of them serving and subserving the life of man. As the flower and the plant, unlike the mineral thing, has a principle of life and growth in it, we recognise and study the law according to which it lives and grows. So with animals, they too have being and life and a law according to which their life is led. So too with man, who shares with all things the first law of all being: *perseverare in esse suo*. All civilised systems of law recognise the *inclination* and the right of Everyman to defend his own existence against unjust attack; and the right of every organised community of men to do the same. On another plane, man shares with the animals their proper being and life, and the law according to which their life is lived—the '*jus naturale quod natura (id est ipse Deus) omnia animalia docuit, ut conjunctio maris et feminae et educatio prolis*'. And though the term *jus naturale* or natural law came to be used by the schoolmen and the English common lawyers to describe the dynamic inclinations and tendencies of our rational human nature, the appetite for marriage and for the care

and education of children, operate in and through the mind and conscience of men and women.[36]

The common law view of the natural law may be stated in a few sentences which I borrow from Professor Vinogradoff: 'It was the necessary outcome of the conviction that the world was created and is governed by divine providence. Law is imposed on the nature of man as on the nature of stones, plants and beasts. Natural law partakes, therefore, of the same character as the laws of weight or of light or of nutrition. No one doubts that sex attraction and parental love are innate in man and in animals alike, and so is reflective reason in the special case of human beings. The distinctions between right and wrong, the consciousness of duty and of right, of reciprocal obligations and reciprocal consideration are as inevitable in human reason as the requirements of logic or the table of multiplication. In its application to conduct the laws of human nature assume the form of concrete commands, prohibitions, demonstrations . . . Thus laws specifically so-called, are an integral part of a moral order based on the natural properties of human beings, more particularly on their reason . . . In a world view of this kind, all particulars are subordinated to the immutable laws of human nature, and all juridical institutions and rules are to be estimated by the higher standard of ethical obligation'.

[36] Cf. Vinogradoff, *Collected Works,* Vol. 2, *On the Sources of the Law.* In an article of the *Summa Theologica* which was cited in the judgment of the Court of Appeal in *Re Carroll,* [1931] 1 K.B. 317, Aquinas asks whether the children of Jews and unbelievers ought to be baptised against the will of their parents. And he answers 'that a child being after its birth, and until it reaches a certain maturity of mind, enfolded in the care of its parents (*sub quodam spirituali utero parentum*) it would be contrary to natural law and justice if it were taken away from its parents' custody or if anything were done to it against their will'. In an earlier case in the Court of Appeal *Re Agar Ellis* (1883), 24 Ch.D., the Court said that to 'set aside the parental authority and to intervene for itself . . . to neglect the natural jurisdiction of the father over the child would be really to set aside the *whole course and order of nature* . . . and . . . to disturb the very foundation of family life'. In line with these decisions was the determination shown by the American Army authorities in the late war 'not to break up the family unit. It has heeded the warning of the psychiatrists who demonstrated beyond any doubt that the best guarantee of a balanced and happy adult is a child who feels secure in the visible love and protection of both parents': *The Times,* October 12, 1943. The attention paid by the American Army authorities to the conclusions of the psychiatrists would have appealed to the mind and heart of Sir Henry Finch for whom the common law was in some sense the synthesis of all the relevant sciences.

The rational nature of man in its proper essence belongs to a plane which is superior to that of the mineral, the vegetable and the animal order. It is *of the nature* of rational beings to live in the society of their fellows. The rational life of man has, too, its own aspiration and appetite and perfection. The appetite of the mind is for the True, and the appetite of the will is for the Good; and this appetite for the Good and for the True takes us beyond ourselves and beyond the State, and even beyond the community of mankind. It is 'the cry of the finite for the Infinite':—

> And thus I know
> This earth is not my sphere
> For I cannot so narrow me
> But that I will exceed it.

Shakespeare reflects the tradition in a famous passage:—

> What is a man, if his chief good and market of his time
> Be but to sleep and feed? A beast no more.
> Sure He that made us with such large discourse
> Looking before and after, gave us not
> That capability and god-like reason
> To fust in us unused.

The common good of man and of the whole community of men is clearly in a spiritual and not a material principle. '*Manifestum est autem quod Deus est bonum commune totius universi et partium ejus*'.

The first great concept of the common law is the free and lawful man whom we meet in *Glanvill*. 'Among laymen', says Maitland, 'the time has indeed already come, when men of one sort, free and lawful men (*liberi et legales homines*) can be treated as men of the common, the ordinary, we may perhaps say the normal sort, while men of all other sorts enjoy privileges or are subject to disabilities which can be called exceptional. The lay Englishman, free but not noble, who is of full age, and who has forfeited none of his rights by crime or sin, is the law's typical man, typical person'.[37] Mark the reference to crime and sin: that is, to the State and to the Church, which are at the service of the ordinary man. The State will protect his life,

[37] Pollock and Maitland, *op. cit.*, Vol. 1, p. 390. 'All through this period, the medieval common law was creating the idea of the normal person—the free and lawful man of the English law': Holdsworth, *History of English Law*, Vol. 3, p. 457.

his liberty, his family, his land, his goods. The Church will fortify his moral and spiritual life by the gift of the sacraments and the grace of God.

'For all we are Christ's creatures And of His coffers rich
And brethren of one blood Alike beggars and earls'.

In all the morality plays of medieval England the ordinary man is named Everyman; Mankind; *Humanum Genus; Anima.* The hero of the greatest of the medieval poems is Piers the Plowman:—

God is much in the gorge: Of these Great Masters
But among mean men Are His mercy and works.

Everyman is a reasonable man; and by virtue of his nature free. For freedom is rooted in reason. The Latin for free will is *liberum arbitrium: libre arbitre.* In the affirmation of freedom, Bracton is more forthright than his younger contemporary St. Thomas Aquinas.[38] Our title to freedom, Bracton says, we hold by natural right. *In hac parte jus civile vel gentium detrahit juri naturali.* The growth of the common law was thus unfavourable to the existence of a class of slaves or serfs or villeins or other men of unfree condition. In the course of time all the unfree and dependent classes were merged in one mass under the general title of villein, and in the end, in obedience to its own principles, and in the interest of social welfare, the common law came to hold the villein to be a free and lawful man. 'One need only glance at the corresponding processes in France and Russia to realise the gravity of this social revolution which in England was effected without an insurrection, without legislation and almost without deliberate thought'.[39]

In the view of the common law, Everyman is presumed to be a good man until the contrary is proved by lawful evidence. *De omni homine praesumitur quod sit bonus homo donec probetur in contrarium.* Everyman, being a good man, is a friend at heart to his fellow man.[40] It is the doctrine of the

[38] Bracton, *De Legibus,* f. 4; Aquinas, S.T., IIa IIae, Q. 57, A. 3. Lottin, *Droit Naturel chez Saint Thomas,* 2nd ed., p. 90.

[39] Plucknett, *Y.B. 13 Richard II,* Introd., pp. xlii–xliii, cited Plucknett, *A Concise History of the Common Law,* 4th ed., pp. 294–295. Special attention is called to the whole of this valuable passage.

[40] *Inest autem homini naturalis inclinatio ad omnium hominum dilectionem; ac si omnis homo omni homini esset familiaris et amicus. Summa contra Gentes,* Book 3, cap. 130. *Videtur quod amicitia inter homines sit de jure naturali,* Vitoria, *De Indis,* Washington, 1917, pp. 257–258.

Utopia: 'The fellowship of nature is a strong league: and men be better and more surely knit together by friendship and benevolence than by covenants of leagues, by hearty affection of mind than by words'. Erasmus is naturally at one with his friend. 'Nature, or rather God, hath shaped this creature (that is, man) not to war, but to friendship, not to destruction but to health, not to wrong, but to kindness and benevolence'.[41] Though conscious of human frailty (which it is the office of the Church through her sacraments and the grace of God to cure), the common law has no hint of the radical corruption of human nature, the theory of Hobbes (and of Hitler) which necessarily exalts the power of the State. For, if human nature be radically corrupt, men need the coercion of external power to lead or to compel them to decent courses and ways of living.

At common law, Everyman is presumed to be a free man, and a good man, innocent of crime and wrongdoing, honest in his dealings,[42] efficient in his work, of good repute among his fellows, living in friendship with his neighbour, in community and peace. Everyman (I paraphrase Franciscus de Vitoria) has the right to hold speech and intercourse with Everyman, and within the limits of justice to exchange goods with him.

Everyman, being free, is also a responsible man; answerable for his own acts and omissions. At common law, no man is answerable for the acts of another unless he has commanded it, or consented to it. Mere relationship between lord and villein did not make the one responsible for the acts of the other. 'It would be against all reason to impute blame or default to a man where he has none in him'.[43]

[41] A plea for the return to the tradition of 'these champions of the good character of natural man' is made by Professor Elliot Smith in his book on *Human History,* p. 189; and see his Letters to *The Times* dated November 13, 1928, November 15, 1929.

[42] 'The practice of merchants is not based on the supposition of possible frauds. The object of mercantile usages is to prevent the risk of insolvency not of fraud; and any one who attempts to follow and understand the law merchant will soon find himself lost if he begins by assuming that merchants conduct their business on the basis of attempting to insure themselves against fraudulent dealing. The contrary is the case: mercantile genius consists principally in knowing whom to trust and with whom to deal, and commercial intercourse and communications is no more based on the supposition of fraud than it is on the supposition of forgery'. *Per* Bowen, L.J., in *Sanders* v. *Maclean* (1883), 2 Q.B.D., at p. 343.

[43] *Ceo serra encounter tout reason de mitter culpe ou default en un home, lou il n'ad nul en luy, car negligence de ses servants ne poit estre dyt son fesauns.* Cited Holdsworth, *History of English Law,* Vol. 3, p. 383.

In its political concepts, the common law again followed the classical and the Christian tradition and took into consideration three elements: the individual, the family and the State. Speaking broadly, the science of the welfare of the individual was the science of ethics; the science of the welfare of the family was the science of economics; and the science of the welfare of the community was the science of politics.[44] It is the habit of modern political economy to use two elements only in its analysis, the individual and the State. In illustrating his doctrine it was a favourite device of Ricardo to imagine two contracting savages, and to consider how they would act. Walter Bagehot says somewhere that every treatise on political economy which he read in his youth began with the supposition of two men cast on an otherwise uninhabited island. And Sir Henry Maine stated the current view when he said, in 1861, 'the unit of an ancient society was the family; of a modern society, the individual'. In the Utopia of the modern political economists, there are no families; there are no women. In his Lloyd Roberts Lecture for 1948, Mr. Richard M. Titmuss protests that an area of contradiction and conflict stretches over much of our social and economic policy, not because we do not care about the family, but because we do not think about the family.[45]

'It is evident that a household is a mean between the individual and the city or kingdom, since just as the individual is part of the household, so is the household part of the city or kingdom'. Marriage, being a sacrament, fell within the jurisdiction of the Church, and the Courts Christian. One may in passing acknowledge the emancipation that the canonists in the course of time effected in the status of the parties to the marriage; the slow decline of the old *mund* of the German law, by which, on marriage, the woman was sold out of one state of protection into another; and the slow decline also of the *patria potestas* of the Roman civil law. Dr. Carlyle calls attention to a Decretal Letter in which Adrian IV, the English Pope, laid it down that 'as in Jesus Christ there is neither free nor slave, and the sacraments are open to all, so also the marriage of slaves must not be prohibited; and even if the contract is made without the consent or against the will of the master (so as to be invalid according

[44] Aquinas, S.T., IIa IIae, Q. 47, A. 11; Q. 50, A. 3.
[45] *Lancet*, November 20, 1948.

to the civil law) the marriage is not to be dissolved or declared void in the Ecclesiastical Court.[46] In view of the argument of Sir John Fortescue in the *De Laudibus*,[47] it is a tenable proposition that the common lawyers and legislators of England were desirous of setting up for marriage and sex behaviour a standard that was superior to the standards of the Roman civil and the Roman canon law. Hence the *Nolumus* of the prelates and the barons at Merton in face of the proposal to introduce the principle of *legitimatio per subsequens matrimonium* into the English law. Let us also observe that the keeping of a bawdy house has always been a criminal offence at common law.

In the view of Piers Plowman, who thinks of life as the quest of God in three stages, Do Well, Do Better, and Do Best, the first stage—the life of active labour—is the honest life of kindly and truthful men who win their livelihood by their labour and their land. Good married folk are the root of Do Well. From such folk all the rest spring.

> Right as the rose That red is and sweet
> Out of a ragged root And a rough briar
> Springeth and spreadeth That spicers desire
> So Do Best out of Do Better And Do Well doth spring.

The constant effort of English law and equity was to give to the family an economic base and in this way to secure its independence. The family was in its way a measure of land holding; the 'hide' of land was the amount necessary and sufficient to maintain a family according to the standards of the time. The principle of inheritance gave stability and continuity to the family life. The law of succession is 'an attempt to express the family in terms of property'. The sanctity of the home was recognised long before *Semayne's Case*: 'The house of Everyman is to him as his castle and fortress as well for his defence against injury as for his repose'.[48]

[46] Carlyle, *Medieval Political Theory*, Vol. 2, pp. 118, 132. Cf. the Canonist legislation of 1215, '*Omnis utriusque sexus fidelis . . .*'.

[47] Chap. 40, Chrimes ed., p. 99.

[48] The Common Law, said Lord Atkin, 'does not regulate the form of agreements between spouses (living in amity). Their promises are not sealed with seals and sealing wax. The consideration that really obtains for them is that natural love and affection which counts for little in these cold courts. The terms may be repudiated, varied or renewed, as performance proceeds, or as disagreements develop, and the principles of the Common Law as to exoneration and discharge and accord and satisfaction are such as find no place in the domestic code. The parties them-

The effort and achievement of the common law was thus to establish in England an association of families of free and responsible and independent men and women living in the fellowship of a free community. 'Whatever the future may contain, the past has shown us no more excellent social order than that in which the mass of the people were the masters of the holdings which they ploughed and of the tools with which they worked and could boast with the English freeholder that 'it is a quietness to a man's mind to live upon his own and to know his heir certain'.[49]

At the turning point of English history, the Inns of Court recognised as their outstanding representative one who had been in turn Speaker of the House of Commons, and Lord Chancellor; one who was the incarnation of English law and equity, and of the Christian philosophy and theology that gave it character and life.

Against this man in an evil time a charge of treason was raised. In the first of the four counts of the Indictment it was alleged that Sir Thomas More had maliciously kept silence (*malitiose penitus silebat*) and refused to give a direct answer to an Interrogatory put to him in the Tower by the Secretary of State, asking whether he recognised the King as the Supreme Head on earth of the Church in England. A statute of a servile Parliament—afterwards to be treated as its title to Omnipotence—had declared the King to be Supreme Head on earth of the Church in England. Henry was to be 'King and Pope and something more than the Pope'.[50] Now, at this trial, the King was claiming the divine prerogative of judging the silences of the mind and conscience.

Against the charge of silence, Sir Thomas More protested: 'Touching I say, this challenge and accusation, I answer that for this my taciturnity and silence neither your law nor any law in the world is able justly and rightly to punish me, unless you

selves are advocates, judges, court, Sheriff's officer and reporter. In respect of these promises, each house is a domain into which the King's Writ does not seek to run, and to which his officers do not seek to be admitted'. *Balfour* v. *Balfour*, [1919] 2 K.B. at p. 579.

49 R. H. Tawney, cited *Blackfriars*, Vol. 28, p. 497.

50 The King as Supreme Head of the Church was in due course empowered by Parliament to define by Proclamation the doctrines of the Christian faith which were to be believed by Everyman on pain of death: 31 Hen. 8, cap. 8.

may beside lay to my charge, either some word or some fact in deed'. At the crisis of his life, which was also a crisis in the life of England, the greatest of the common lawyers appealed to the Philosophy of Law of the greatest of the Christian theologians. In one of his arguments for the existence and operation of a divine law, St. Thomas Aquinas says that a human court cannot judge interior acts that lie hidden, but only exterior acts of which evidence can be given. And yet for the perfection of virtue it is necessary that in both kinds of acts a man should conduct himself aright. And so, since human law cannot sufficiently control or order interior acts, it was necessary for this purpose that a divine law should be in operation.

The protest and argument of Sir Thomas More were overruled. Following on the verdict of guilty, More interrupted Audley, who was proceeding at once to pass judgment. 'My Lord, when I was toward the law, the manner in such a case was to ask the prisoner, before judgment, why judgment should not be given against him'. At the invitation of Audley, he spoke: 'Seeing that I see ye are determined to condemn me (God knoweth how), I will now in discharge of my conscience, speak my mind plainly and freely touching my Indictment, and *your Statute withal.* And he added that just as London 'being one poor member in respect of the whole realm', could not make a particular law against England, neither could England make a law against the Universal Church.

Events took their predetermined course. On July 6, 1535, the day on which he wished to die (it was the Eve of St. Thomas of Canterbury, and the Octave of St. Peter) Sir Thomas More was beheaded on Tower Hill.

'In 1535', says Maitland, 'the year in which More was done to death, the Year Books come to an end. In other words the great stream of law reports that has been flowing for near two centuries and a half, ever since the days of Edward I, becomes discontinuous and then runs dry. The exact significance of this ominous event has never yet been duly explored, but ominous it surely is. Some words that once fell from Edmund Burke occur to us: 'To put an end to the Reports is to put an end to the law of England'.

The strange language of Maitland has now, you may think, unfolded its mystery. A philosophy of which the origin and

principle is an evil act or a series of evil acts, is an evil philosophy and likely to have evil consequences. The new philosophy to which the life and thought of Sir Thomas More were sacrificed, did in principle and in the actual course of history, put an end to the law of England. It destroyed its old foundations in the law of God, and in the natural law.

It laid upon the 'new Anglican Church' the dead hand of the State, until in our own time the House of Lords declared (by a majority) that Christianity is no longer part of the law of England. 'My lords', said Lord Sumner, not without unction, 'with all respect for the great names of the lawyers who have used it, the phrase "Christianity is part of the law of England," is really not law; it is rhetoric'.[51]

Christianity being no longer part of the law of England, the State is no longer in essence a Christian State. It would be error to suppose that this decline from its ancient Christian character and tradition is without consequences in the development of international and colonial affairs. A study of the old charters that were granted in the Tudor and the Stuart times to settlers in the new plantations, and of certain passages in the *De Indis* of Franciscus de Vitoria, leads to sombre thought and reflection. At home, the State seems to be in process of exchanging its ancient dignity for the new status of a Trading Corporation. Our educational outlook and arrangements are being adjusted to the change.

In relation to the common law, Lord Macmillan has lately said: 'The lover of our ancient laws and institutions . . . cannot but look with some dismay at the process which we see daily in operation around us, whereby the customary common law of the land, which has served us so well in the past, is being more and more superseded by a system of laws which have no regard for the usages and customs of the people, but are dictated by 'ideological theories'.

'There will soon be little of the common law left either in

[51] [1917] A.C. 409, 452, 464. 'It is true that there is still an Established Church; that the King is still its supreme governor and the defender of its faith; that its law is still the King's ecclesiastical law and an integral part of the law of England. But, like many other parts of the law and constitution of England, these are survivals of an older order from which all real meaning has departed with the abandonment of the medieval theory of Church and State to which they owed their origin': Holdsworth, *History of English Law*, Vol. 8, p. 403.

England or in Scotland, and the Statute Book and vast volumes of statutory rules and orders will take its place. The work of our courts is more and more concerned with the interpretation of often unintelligible legislation and less and less concerned with the discussion and development of legal principles. . . . It is of vital importance that the new policy, while truly promoting liberty by securing better conditions of life for the people, should not, in its zeal for interference, deprive them of their initiative and independence, which were the nation's most valuable asset'.[52]

There is also another asset to which Lord Macmillan omits to refer: the good will which once upon a time was the principle of action of Everyman. 'If a man has many goods', says Walter Hilton, in the *Scale of Perfection*,[53] 'then he has much good to do; if he has little, less may he do; and if he has naught then must he have a good will'.

The danger is lest the ideological theories to which Lord Macmillan refers, and the talk of an inevitable class war, may dissolve, in the mind and heart of Everyman, the good will on which the whole common law and the whole of our civilisation reposes.

[52] Lord Macmillan in his Andrew Lang lecture on *Law and Custom*, *The Times*, April 6, 1948.

[53] Chap 2. Walter Hilton was one of the masters of Sir Thomas More in prose style and in the spiritual life.

9

SOME ENGLISH CIVILIANS

H. F. Jolowicz

The fortunes of Roman Law in England provide a very wide subject. It would be possible under such a heading to discuss the influence exerted on English law in many different ways at different times in its history; the rivalry between the courts applying the common law and those applying the civil law; the reasons why native ideas were able to assert themselves more vigorously here than elsewhere; the continuance none the less, long after the victory of the common law was assured, of courts governed by the civil law, and the final fusion brought about by the Judicature Acts. But it is of none of these high matters that I wish to speak, nor do I wish to deal with the period before the Reformation, when the relation between Roman law and the native system was not so very different here from that which existed abroad, and when the study of the civil and canon law in the universities conformed broadly to the usual medieval pattern.

I propose rather to speak of more modern times, when in the struggle for supremacy between the civil law courts and the common law courts the victory of the latter was nearly or quite assured. What, I want to ask, has been since then the attitude of Englishmen to the civil law; what arguments has it aroused, and to what sort of literature has it given rise? And I may say at once that I have taken some comfort from my studies in this connection. Under the Stuarts professors of Roman law were lamenting the decay of their subject, and prophesying that it would soon be quite forgotten. After three centuries there is still enough of it left for them to have successors who can echo their complaints.

The struggle between the civil and the common law was not finally settled until the long Parliament,[1] and even after the Restoration the common law courts still had some fields to

[1] Holdsworth, *History of English Law* (hereinafter cited as *H.E.L.*), 4, 293.

conquer, but at least as early as James I's reign there appears a certain querulousness in the civilian writers which indicates the losing side. Sir Thomas Ridley, for instance, in his *View of the Civil Law,* first published in 1607, expressly appeals to the King to help the weaker side, which, he says, 'ever goeth to the worse'.[2] Half a century later, Robert Wiseman in his *Law of Laws* (1656) says that 'the very law-books, for want of use here' are 'all transported beyond the sea to other nations',[3] and Arthur Duck,[4] a more sober person than the fanatical Wiseman, speaks in an equally gloomy strain.

There was, of course, a very definite bread-and-butter, or trade union, side to all this. The civilians' profession had seldom been lucrative in England and now they were feeling the pinch badly. Ridley speaks of 'beggary',[5] and in places his book reads like a not very dignified plea that civilians should be allowed to make a decent living.[6] Dr. Senior has collected evidence of their poverty both before and after that period.[7] Much later, it is true, when Dickens wrote *David Copperfield,* and not long before Doctors Commons came to an end (1857), it was evidently possible for some practitioners to do very well. The premium to be paid for David's articles to Mr. Spenlow was £1,000. But even then there was another side to the matter. In 1832 junior civilians were evidently glad to get a guinea a day for sitting in the Court of Delegates[8] and Robert Phillimore in an admittedly controversial pamphlet, published in 1848, could argue that as regards expenses the civil law courts compared favourably with others.[9]

Writers on the civil law however not only lament their own penury and the opposition with which they meet; they also give us some insight into the nature of the complaints that were made

[2] Dedicatory 'Epistle' to the King.
[3] Epistle to the Reader, third page.
[4] *De Usu et Authoritate Juris Civilis Romanorum per Dominia Principum Christianorum* (first published 1648), Book 2, Chap. 8, Part 3, § 32 (ed. of 1689, p. 350). Quoted *H.E.L.*, 5, 25, n. 1.
[5] *Op. cit.* Part 4, Cap 3 (ed. of 1675, p. 393).
[6] Perhaps Thomas Wood *A New Institute of the Imperial or Civil Law,* second ed. (1712), Preface, p. 8 is thinking of Ridley when he says that the purpose of the civil law is 'not only to support the professors of it'.
[7] *Doctors Commons and the Old Court of Admiralty* (1922), 5, 79, 99.
[8] *H.E.L.*, 1, 605.
[9] *The Practice and Courts of Civil and Ecclesiastical Law, and the Statements in Mr. Bouverie's Speech . . . examined in a letter to The Right Hon. W. E. Gladstone.*

against them. These fall, I think, into three main classes. The civil law was arraigned as being (i) dangerous to constitutional liberty, (ii) foreign and (iii) useless.

The first charge I will pass over quickly, for I have discussed it elsewhere.[10] There was a great deal of high politics mixed up with the rivalry of the courts, especially in the early stages, and Holdsworth has taught us that the alliance between Parliament and the common lawyers had much to do with the triumph of constitutionalism in this country.[11] But this must not mislead us into thinking that the struggle was to any great extent one between an autocratic civil law and a democratic common law. The form of the question was rather what scope the common law allowed to the King's prerogative, and James I at any rate professed himself perfectly well satisfied with the common law on that score, giving quite different reasons for holding the civil law also in esteem. 'As a king', he said, 'I have least cause of any man to dislike the common law; for no law can be more favourable and advantageous for a king, and extendeth further his prerogative than it doth . . . yet . . . I do greatly esteem the civil law, the profession thereof serving more for general learning and being most necessary for matters of treaty with all foreign nations'.[12] The supporters of the prerogative tried, not quite unsuccessfully, to vie with Coke and his party in citing Year Book authority for their contentions, and by no means all common lawyers were Roundheads, nor were all civilians for the King.

Of the latter Cowell in James I's reign, and Duck during the Civil War were royalists, and so too, though perhaps not quite so strongly, was Zouche. But Godolphin, distinguished for his works on the law of wills, was a supporter of the Parliament, and Isaac Dorislaus, a Dutch civilian, even took some part in the trial of Charles I.[13] After the Restoration Sir Leoline Jenkins, the most distinguished practical civilian of his day, though royalist in his general outlook, was not in favour of absolute

10 *Political Implications of Roman Law,* 22 *Tulane Law Review* (1947), 62–81.

11 *The Influence of the Legal Profession on the Growth of the English Constitution* (1924), reprinted in *Essays in Law and History* (1946), 71–99; *H.E.L.,* 6, 1, *et seq.*

12 Quoted by Wiseman, *Law of Laws,* Lib. 2, Cap. 5 (ed. 1656, p. 133).

13 *H.E.L.,* 5, 8. W. Senior, *op. cit.* (above n. 7), 92.

monarchy,[14] and even after the Revolution of 1688 the division of opinion continued.[15] John Ayliffe, of whom more below, was 'an ardent whig'.[16] But the charge of absolutism was one which constantly reappeared in England, and civilians of all ages have been concerned to rebut it. Wiseman was eager to show that he did not support the civil law because of any absolutist tendencies, as appears by his reference to James I's words on the prerogative,[17] and he is careful to point out that abroad it is the basis of private, not of public, law.[18] With the establishment of the Revolution settlement, it became almost common form to protect oneself from the implication that any one arguing for the civil law must be a Jacobite. Wood,[19] after pointing out various advantages of the Roman system, says that in England the common law and the statutes 'have set prudent bounds to the power of our princes'. Even as late as 1774, Hallifax, neatly tabulating the usual arguments for and against the civil law, almost echoes Wiseman's words and thinks the contrast with Rome will bring home to students the superiority of the British constitution.[20] He also points out that one advantage of teaching law in England is that students need no longer go abroad, where they might imbibe wrong ideas both about religion and about government.[21] So far as the latter is concerned, it is clearly despotical notions that he fears the young Englishman will learn from misguided foreigners.[22]

The reproach of foreignness is thus sometimes bound up with that of absolutism, but it also occurs separately, and the civilians are concerned to answer it too. Duck, for instance, says that the common lawyers upbraid them as 'citizens of a foreign state,

14 *H.E.L.*, 12, 651.
15 W. Senior, *op. cit.* (above n. 7), 103.
16 *H.E.L.*, 12, 611.
17 Above, n. 12.
18 *Op. cit.* (above n. 12), Lib. 2, Cap. 4, p. 128.
19 *Op. cit.* (above n. 6), Preface, p. iv.
20 *An Analysis of the Roman Law* (1774), Preface, pp. iv–v. Cf. below n. 58.
21 *Ibid.*, xi.
22 Blackstone (whom he quotes *ibid.*, 6–7). *Commentaries*, 1, 5 had also lamented the necessity for Englishmen to go abroad, but without the same somewhat ridiculous implications. For danger to political liberty, cf. Thomas Bever, *History of the Legal Polity of the Roman State, and of the Rise, Progress and Extent of the Roman Laws* (1781), Introduction, p. ii–iii, where he says the civil law 'has been too often carelessly thrown aside as obsolete and useless; and even represented as dangerous to the civil polity of the nation'.

strangers in their own'. His answer is not very effective,[23] but Wiseman[24] replies roundly to similar charges that the Roman laws were no more foreign than those of the 'Saxons, Danes and Normans, of which our English Antiquaries, Cambden, Spelmann, Cowell and Selden all take notice that the laws of this nation are but a mixture and composition'. In reality there can be no answer to the charge. The question is how far the foreign system may be worthy of acceptance or, historically, why the English should have reacted more strongly against it than other peoples. Many Frenchmen, to say nothing of Germans, disliked it as foreign, but the English insular prejudice was more pronounced and well known abroad. Foreign writers, says Duck, even make the mistake of thinking that there is no Roman law at all in England, because they find no literature on it comparable to that of other countries, and cannot discover what validity it has from books written in an idiom that is unknown to them.[25] Nearly two centuries later a French author quoted by Irving[26] said, 'It seems to me that the English are beginning to give up their long-established prejudices against the Roman law, but it is still very difficult and very rare to find a copy of the Corpus Juris in the library of a barrister in London'. He would, I fear, not find it any easier or commoner to-day.

The main charge however is that the Roman law, being foreign, is useless here. 'Two things', says Zouche, 'appear to deter our countrymen from the study of the civil law, first that it appears to have little utility as it is deemed foreign to the institutions of this kingdom'—the other objection being its supposed difficulty,[27] and Duck similarly speaks of the reproach levelled by the common lawyers against the civilians that they

[23] *Loc. cit.* (above n. 4). He says *cum meminisse potuissent quid in eos pro nobis exteri retorserint,* apparently referring to the mention just before of a speech by Gentili at Oxford in which he had complained that unlearned scribes competed with the leading professors of law.

[24] *Op. cit.* (above n. 12), Lib. 2, Cap. 12, p. 180. Cowell had also said in the Preface to his *Institutiones iuris Anglicani ad methodum et seriem institutionum imperialium compositæ et digestæ* (1605) that English laws were no more different from Roman law than were the laws of other nations.

[25] *Op. cit.* (above n. 4), Book 2, Cap. 8, Part 1, § 1 (p. 273).

[26] *Introduction to the Study of the Civil Law,* 4th ed., p. 95, n. 2, quoting Dr. Jourdan. Cf. p. 153 below.

[27] *Elementa Jurisprudentiæ* (1629), Dedication, *Juventuti Magnæ Britanniæ Juris Studiosæ.*

study foreign laws which are useless here.[28] Much later Thomas Bever speaks of the Roman law as 'too often carelessly thrown aside as obsolete and useless'.[29] But the validity of the charge obviously depended to a great extent on the progress of the struggle for jurisdiction. The more successful the other courts were in extending their jurisdiction at the expense of the civilian and ecclesiastical courts, the better justified it became. This is not the whole story indeed, even from the purely practical point of view, for one of the chief practical uses of the civil law recognized in Tudor and Stuart times, and unconnected with any courts in this country, was that it was necessary for diplomacy.[30] Duck, it is true, writing during the Civil War, complained that since the latter part of Elizabeth's reign, those in charge of public affairs had used mere amanuenses to transcribe treaties in preference to employing properly qualified jurists,[31] but his complaint seems hardly justified. Bacon certainly, though himself a common lawyer, had no doubts about the importance of civilians for international relations,[32] and after the Restoration the connection continued, particularly in the person of Sir Leoline Jenkins, who, among his many other activities, was often sent abroad on important missions, including, for instance, the negotiation of the Peace of Nimuegen.[33] This was, according to Dr. Senior,[34] almost the last actual foreign mission undertaken by a member of Doctors Commons, but for some considerable time yet the doctors continued to be consulted by the Government, sometimes with the law officers, on points of international law.[35] Even as late as 1830 evidence was given to the Commissioners appointed to inquire into the Ecclesiastical Courts that the King's Advocate was often consulted by the Government on matters of international law,[36] and Chief Justice Tindal seems to have thought it a sufficient argument for retaining Doctors

[28] *Loc. cit.*, above, n. 4.
[29] *Loc. cit.* (above n. 22).
[30] *H.E.L.*, 4, 233.
[31] *Op. cit.* (above n. 4), Book 2, Cap. 8, Part 3, § 31 (p. 349).
[32] *Mysteries of State and Government in Letters of Illustrious Persons* (1691), p. 41, quoted by Senior, *op. cit.* (above n. 7), p. 71.
[33] *H.E.L.*, 12, 649.
[34] *Op. cit.* (above n. 7), p. 108.
[35] Senior, *op. cit.*, 105.
[36] R. Phillimore, *op. cit.*, above, n. 9, p. 139 (evidence of Lord Campbell) and pp. 156–159 (evidence of W. R. Hamilton, Under-Secretary of State for Foreign Affairs 1809–1822).

Commons that the emoluments provided by testamentary causes in peace-time kept in existence a body of experts in international and prize law for service when war should break out.[37]

Apart from international law however the 'civil law' as applied by the courts in this country was, in the eighteenth century, losing more and more its connection with legal thought abroad, and becoming exclusively concerned with the peculiar traditions of these courts themselves. In consequence the knowledge of most practitioners must have been very narrow. 'Our budge-doctors', Gibbon[38] calls them, and 'budge' according to Johnson means 'surly, stiff, formal'. Their business was, as Gibbon goes on to say, 'confined to a small circle', and they were in his day already becoming the 'family party' that Dickens described. For professional education they were even worse off than the common lawyers. They had indeed to be doctors of law of either Oxford or Cambridge, but that was no more a proof of learning in the eighteenth century than was call to the Bar. It is true that the newly-joined member had to keep silence for a year, but there was no guarantee that while his mouth was shut his ears were well occupied. If he wanted to learn his business, however, attendance in court must have been even more essential for him than for the common lawyer, for regular series of reports which would interest him did not begin to appear till the end of the century. Like the Talmudists, it was said, the civilians dealt in oral traditions and secret writings.[39]

A field so restricted could furnish no real answer to the charge that the foreign law was useless. The answer lay, and lies, in spiritualising, so to speak, both the uselessness and the foreignness. The lack of direct application in the courts, and even in international intercourse, should lead men to value the general Roman scheme because it provides a basis for systematic jurisprudence free from the trammels of an actual territorial system. When Kenny tried to define a crime in English law he was, in Dr. Allen's words 'everywhere baulked by the existence of the curious kind of procedure known as the "penal action"'.[40] The civilian—I mean, of course, the dogmatic lawyer, not the historian—is not so tied, and by the 'foreign' nature of his

[37] *Ibid.*, pp. 142 *et seq.*
[38] Autobiographies of Gibbon, Memoir F. 69, quoted *H.E.L.*, 4, 272.
[39] *H.E.L.*, 12, 105, n. 8.
[40] C. K. Allen, *Legal Duties*, 226.

studies should keep his more practical colleagues from being imprisoned in their own national idiom.

This argument was seen from early times in England. Cowell reproaches the common lawyers for sticking so closely to their statutes and cases that they care nothing for the universal reason of natural law or sweet ἐπιεικεία.[41] Fulbecke too[42] tried to harmonise canon, civil and common law by making the students of each better acquainted with the specialities of the others. But both these authors, I think, made the mistake of trying to minimise the differences between the common and the civil law —certainly Cowell did. It gives one a shock for instance to read in a work on English law, even one addressed to civilians, that *hereditas est successio in universum ius feudale quod defunctus antecessor habuit,*[43] as if the mere insertion of the word *feudale* were enough to explain the difference between the English heir and the Roman *heres*. Zouche had a wider vision than either Cowell or Fulbecke. In the Dedication of his *Elementa Jurisprudentiæ,* he does indeed say that one of his objects is to expound the 'idea of law, in which our own and foreign nations for the most part agree', but he also wishes to explain 'some principles of the civil law which might be of use to our men and worthy of observation without being difficult to fit in'. The book is in fact concerned with general rules on a civilian basis, and Zouche was, as Holdsworth says, not only one of the founders of modern international law, but also the earliest English writer on jurisprudence.[44] It is here that there lay promise for the future. Roman law could fructify the English system not so much by providing specific rules, as by giving it general ideas and a framework on which it could develop those branches in which it was as yet deficient. Thomas Wood puts the matter quaintly when he says that the common law 'originally gave no methodical account of things purely rational, as of obligations, contracts, crimes, trespasses, last wills and testaments, judicature and the nature of other human acts'.[45] This catalogue is difficult to defend in some of its details, and is perhaps partly due to not

[41] *Op. cit.* (above n. 24), Preface. Cf. also James I's remarks, above n. 12.
[42] *Parallete or Conference of the Civil Law, the Common Law and the Common Law of England* (1601).
[43] *Op. cit.* (above n. 24), Lib. 3, 1, § 2.
[44] *H.E.L.*, 5, 17.
[45] *Op. cit.* (above n. 6), Preface, 5.

very intelligent adaptation of some words used by Duck,[46] but it is a valuable statement by a man who was himself primarily a common lawyer, and a forerunner of Blackstone in that he both advocated the teaching of English law in the universities and wrote an elementary book on the subject. Blackstone himself had no doubt about the value of the Roman law, or the place it ought to fill. 'Far be it from me', he says, 'to derogate from the study of the civil law considered (apart from any binding authority) as a collection of human reason. No man is more thoroughly persuaded of the general excellence of its rules and the usual equity of its decisions, nor is better convinced of its use as well as ornament to the scholar, the divine, the statesman and even the common lawyer'.[47]

Here the word to which I wish to draw your attention particularly is 'scholar', for it suggests a view that we have not yet considered. The interest of Roman law for scholarship goes back at least as far as the Renaissance; it has always since then played a part in the treatment of the subject, and I want to devote the rest of my time to considering how far it influenced the English attitude and the English literature.

The sixteenth century saw the rise, especially in France, of the 'humanist' school, which sought to apply all the methods of the new learning to the elucidation of the true Roman law as it had existed in antiquity, and cared nothing for the medieval interpretations which had been put upon the texts. Their opponents, on the other hand, knew that it was these interpretations which had taken root in the courts, and that without some adaptation it was hopeless to apply the texts to the greatly changed circumstances of the contemporary world. From their adherence to the methods of the most famous medieval lawyer they were sometimes known as 'Bartolists', and their method as the *mos Italicus,* from its continuance in Italy, in opposition to the humanist *mos Gallicus* which had its main seat in France. Holdsworth says that the division was found in England as elsewhere, and goes on to point out that Sir Thomas Smith (1513–

[46] *Op. cit.* (above n. 4), Lib. 2, Cap. 8, Part 3, § 11 (pp. 330–331) *Ad omnes enim curias in quibus non merum et consuetudinarium ius, sed æquitas spectanda est, nullius gentis leges tam accommodatæ sunt, quam ius civile Romanorum, quod amplissimas continet regulas de contractibus, testamentis, delictis, iudiciis et omnibus humanis actionibus.*

[47] *Commentaries,* 1, 5.

1577) was a humanist, whereas Gentili (1552–1608) belonged to the opposite school.[48] Gentili was an Italian, so that it is not surprising that he should follow the *mos Italicus,* and he was in fact one of its ablest and warmest supporters. But it would, I think, be difficult to find in England another Bartolist of anything like equal eminence. The foreign jurists who came here, seem to have been mostly humanists, and included, for instance, Pithou who produced the first edition of *Collatio Legum Mosaicarum et Romanarum* (1573) which, being a juristic work that had survived outside Justinian's *Corpus Juris,* was particularly interesting to humanists. Another was Jean Hotman, son of Francis, a very famous figure in the same school.[49] Indeed with the restricted application of the civil law in England, there was clearly less scope for the Bartolist tradition than elsewhere, and the actual practical literature here came to be diverted from the main stream of civilian writing abroad because the law with which it dealt took on, from early times, a peculiarly English character. Thus there were famous books on the law of wills, Swinburn's *Treatise of Testaments and Last Wills* and Godolphin's *Orphan's Legacy,* which remained long in use, and this was a branch of the law with which the ecclesiastical courts and therefore the 'civilians' were concerned. But, for reasons that Holdsworth explains, such rules as existed on this subject were, even at the time these books were first written, already English rules,[50] and the same is true later of such books of practice as Oughton's *Ordo Judiciorum.* Though the general outlook is civilian, the procedure has become specialised and is without interest except in connection with this country.

The more general literature springs, I think, clearly from a humanist root, but in it we can nevertheless distinguish between those writers whose primary interest is in the Roman system as law, and those who cared for it mainly as part of the heritage of antiquity. So too, on the Continent, even after the old opposition between humanists and Bartolists had died out, the 'elegant' jurisprudence of Holland and Germany represented an attitude similar to that of the humanists. In this country, it

[48] *H.E.L.,* 4, 239.

[49] *H.E.L.,* 4, 235. In a letter to J. Hotman, whom he had met at Oxford, Gentili refers to the discussions they had had there. See G. Astuti, *Mos Italicus et Mos Gallicus* (1937), 21.

[50] *H.E.L.,* 5, 14.

seems to me, writers akin to the 'elegant' school finally prevailed, and I am not sure that this was in the best interest of English law or scholarship.

If we begin with Richard Zouche (1589–1661) we have, I think, no difficulty in recognising the humanist. He can indeed quote Bartolus when he thinks fit and use the old method of putting the arguments *quod sic* and *quod non,* but his free handling of the texts and his use of history is not Bartolist. A small point too characterises him. He discards the traditional method of citing the *Corpus Juris* by the first words of the *lex* and the name of the title—*e.g.* l. *In navem Saufeii* tit. *locati conducti*—in favour of the 'philological' method of giving the number of book, title and *lex* in that order, *e.g.* D. 19, 2, 31.[51] In this practice he has been generally followed in this country, whereas there are traces of the older system on the Continent even today. But he is a lawyer first and foremost. In his *Elementa Jurisprudentiæ* he does not, like most later writers of elementary books, base himself on the Institutes, and over-emphasis on the Institutes is, I think, a fault which commonly goes with the 'elegant' or 'philological' attitude. The book is, as its extended title makes clear, 'illustrated by select definitions, maxims and opinions of the civil law'.[52] Indeed this is an understatement, for it sometimes reads like an incredibly ingenious stringing together of maxims drawn from various sources, but especially from the last title of the Digest, *De diversis regulis iuris antiqui.* These maxims, in spite of Paulus' warning which is placed at the head of the title,[53] have played quite an important part in influencing modern systems, including the English, and explain much that is lacking in the Institutes. They have now disappeared from elementary education but they remained part of it even in this country for some time. Wood says that in the universities 'young men think themselves obliged to read an Institute of the Imperial Law, and a comment upon the Title *De regulis iuris'*.[54] His own book on Roman law also contains a good deal of this learning on the maxims, though following in the main the scheme of the Institutes. He too is clearly far

[51] See Preface to his *Quæstionum Juris Civilis Centuria* (1660).
[52] *Definitionibus regulis et sententiis selectioribus iuris civilis illustrata.*
[53] *Non ex regula ius sumatur, sed ex iure quod est regula fiet.* D. 50, 17, 1.
[54] *Some Thoughts Concerning the Study of the Laws of England, Particularly in the Two Universities* (2nd ed., 1727), 8.

more of a lawyer than a classical scholar, for he was a barrister and wrote also on English law, though he took orders late in life. He devotes very little space to history.

John Ayliffe (1676–1732), perhaps the most learned English Romanist before Buckland, is more difficult to class. He knew the classics well and includes a good deal of history in his work, but I think that in him too the legal interest predominates. In early life he practised as a proctor in the Vice-Chancellor's court at Oxford, and he tells us that his work on ecclesiastical law was originally compiled for his own use when he was a practitioner and 'had a prospect of succeeding to some Chancellorship or other preferment in the Church of a like nature'.[55] So too the only part of his great work on Roman law[56] published during his lifetime was dedicated to a Member of Parliament and intended as a practical contribution to the deliberations of the House of Commons on the subject of frauds by pawn-brokers and the like.[57]

Samuel Hallifax (1733–1790) carries on a similar legal tradition to the extent that he gives hardly any external history. He was, however, himself a college tutor at Cambridge, later Professor of Civil Law, and eventually became a bishop. He also follows Blackstone in putting the scholar first in his list of persons and purposes for which the Roman law is useful. The list is conventional, and he almost confesses his lack of interest in the subject at the end of his Preface when he says that he will 'return to those more serious and important studies', to which he had originally devoted himself, *i.e.* no doubt, divinity.[58] Probably because, though an able man, he spared little real thought for the law, he gives a conventional view that was hardly up-to-date in his own day, but his book seems to have been found academically useful, and went through several editions. It is called *An Analysis of the Roman Civil Law* and consists in places of little more than headings for lectures. For this purpose it was used, apparently, by J. W. Geldart, who held the chair at Cambridge from 1814 to 1847. During that period a new

[55] Preface to *Parergon Juris Canonici Anglicani* (1726). Cf. *H.E.L.*, 12, 611.
[56] *A New Pandect of Roman Civil Law,* published posthumously in 1734.
[57] *The Law of Pledges or Pawns, As it was in Use amongst the Romans, and is now practiced in most Foreign Nations* (1732).
[58] *Op. cit.* (above n. 20), Preface, xxiii.

edition of Hallifax was, according to the *Dictionary of National Biography,* his only literary production. But at least he did lecture, which was by no means always the case with his Oxford counterparts,[59] and he even introduced a system of terminal examinations which he compelled candidates for a degree to pass.[60]

But to return to the eighteenth century—another clerical don does definitely represent the 'elegant' school. This is Robert Eden, fellow of University College, Oxford, and subsequently Archdeacon of Winchester, who published his *Jurisprudentia Philologica* in 1744. His general trend is shown not only by his title, but by the special mention in the Preface[61] of authors who have illustrated their work by classical notes. These include the great humanists Cujas, Alciati and Hotman, and, among later writers, Heineccius is specially singled out. It is not always realised that Heineccius, whose works were much used in this country, was pre-eminently an 'elegant' jurist. Eden's arrangement follows that of the Institutes closely, and he explains that his object is to render the rather inelegant precepts of the law more acceptable to the delicate palate of youth. It is true that he brings in comparisons with English law, but these are derived mainly from Cowell, whose work was nearly a century-and-a-half old. As a clergyman Eden was ineligible for Doctors Commons, and he presumably got all his knowledge of English law from books.

George Harris, on the other hand, who is a little later, was an advocate of Doctors Commons, and is even called an 'eminent pleader',[62] but the work in question here was written when he was young, in 1756. It consists of a text and translation of the Institutes with some rather thin notes which, though 'chiefly relevant to the law of England', were clearly not the result of experience. There is included also a *Brief Account of the Rise and Progress of the Roman Law,* but it is very brief. He himself says in the 'Advertisement' that he had a double object, both academic and practical, and that his translation was published 'on a presumption that most young persons are best acquainted with their own language'—not perhaps a very hazardous assump-

[59] Irving, *op. cit.,* above n. 26, 113.
[60] *H.E.L.,* 12, 84.
[61] p. 6.
[62] C. Coote, *Lives of the English Civilians,* p. 122.

tion, even if it had been extended to older people. He also says it was intended as an introduction to Vinnius' edition. That was indeed a very popular book, and one which, as Professor Lee[63] has recently reminded us, was specially recommended by Lord Mansfield, but it is also worth noting that its author receives a special testimonial of proficiency in elegant learning from Heineccius himself.[64] Harris clearly took pains with his style, and his translation continued to be published up to the middle of the nineteenth century.

Thomas Bever, though he too belonged to Doctors Commons, and speaks of his 'daily employment in a very laborious profession',[65] is also of the elegant school. His lectures[66] at Oxford evidently covered the whole civilian field, but his unfinished *History* deals with external history only.

A much more interesting contemporary was John Taylor, foremost of those scholarly clergymen who turned their attention to law. He too was originally a member of Doctors Commons, but gave up the law for the Church, and became well known as editor of Demosthenes. His *Elements of the Civil Law* (1754) was, as Holdsworth says,[67] intended as an introduction to the study of Roman law and law generally, and he was quite capable, occasionally, of discussing a dogmatic point. But his real interest was obviously classical and historical, almost antiquarian, and his book contains a wealth of amusing investigations into individual questions, supported by a mass of quotations from ancient writers of all sorts. He had also, characteristically, published a separate work on the clause in the XII Tables which allowed creditors to cut in pieces an insolvent debtor.[68] But, as Irving puts it, 'the materials are generally much superior to the arrangement',[69] and it is difficult to obtain enlightenment from him

[63] *Elements of Roman Law*, 3.

[64] In the Preface to the edition published by him: *Vix enim ulla est boni interpretis virtus, quæ non in Vinnio nostro eluxerit. Attulerat ad iurisprudentiam . . . haud vulgarem Latinarum Græcarumque litterarum facultatem, diffusam omnis ævi scriptorum lectionem, notitiam antiquitatum haud mediocrem. . . .*

[65] 'Advertisement' to his *History*, cf. note 22 above. Incidentally, this *History*, though unfinished, is larger than might be inferred from *H.E.L.*, 12, 645. It contains some 500 quarto pages.

[66] Preserved in manuscript, *H.E.L.*, 12, 645.

[67] *H.E.L.*, 12, 644.

[68] *Comment. ad l.X viralem de inope debitore . . . dissecando* (1742).

[69] *Observations on the Study of the Civil Law*, 1st ed. (1815), pp. 19–20. Cf. p. 153 below.

about such things as contract or delict, neither of which words occurs either in the table of contents or in the index. He was, in fact, in spite of his learning, something of a dilettante, and represents the extreme reached in England, of that type of jurisprudence which is so elegant that it almost forgets to treat of law.

Taylor did not live long enough to see the rise of the new historical school in Germany under Hugo and Savigny. I have not discovered when knowledge of this school became common in England. Bentham spoke of it with scorn in 1830,[70] and Geldart's edition of Hallifax, published in 1836, has at least one reference to Savigny. But Geldart had not apparently noticed the most spectacular feat of the historical school, the discovery of Gaius' *Institutes,* which had taken place twenty years earlier, or at any rate he did not think it worthy of remark.

Very different at first, was the attitude in Scotland. As early as 1794, it seems, Wilde, an Edinburgh professor, had been so impressed by the success of the new school that he had predicted a time when the whole Roman system would be restored to what it was when Papinian, Paulus and Ulpian were alive.[71] In 1826 John Reddie, a young Scotsman, who had studied under Hugo, wrote an enthusiastic account of recent studies in Germany,[72] and in 1837 David Irving dedicated to Hugo the much enlarged fourth edition of his *Introduction to the Study of the Civil Law.* Irving was a distinguished Scottish man of letters with considerable knowledge of the law. In the original version of his book, which is only a short pamphlet published in 1815, there is no mention of any authors of the new school and, incidentally, Gibbon's famous forty-fourth chapter comes in for some very lukewarm praise. In the edition of 1837, which is a fair-sized book, the chilling references to Gibbon have disappeared, perhaps because the author had since found out that Hugo himself had edited a translation of the chapter into German with notes in 1789. The discovery of Gaius is also appraised at its true value and some pages devoted to a description of the find and the editions.[73]

70 *Works,* Vol. 4, p. 425.
71 Reddie, *op. cit.,* next note p. 93.
72 *Historical notices of the Roman Law and of the recent progress of its study in Germany,* Edinburgh, 1826.
73 pp. 26 *et seq.*

I cannot carry the story further now. From about this time onwards, with the increasing admiration for Savigny's work, the historical school influenced legal studies in this country a good deal. Maine quotes Savigny and, though he is a very different sort of historical jurist, could not have written as he did without the new knowledge. Indeed in a way the historical method went further here than in the country of its origin. There it was never without implications for the living law; here connection with the law-courts almost ceased to exist. One result was that too much stress was laid on Gaius as representing the 'true' Roman law, and on the contrast with Justinian's Institutes. Insufficient attention was paid to the Digest, and the 'maxims' were despised. The consequence was that the practical character of the Roman law and its function of linking modern systems together was forgotten. It is to be hoped that a new generation of scholars will reverse this trend. We need a type of study which, while not neglecting the classical law, leaves the detail of that to specialists, and concentrates rather on the civil law as a continuous and still living element in the common civilisation of Europe.

CODIFYING ENGLISH LAW

DENNIS LLOYD

'The Anglo-Saxon ever left an empty space around his houses; and that, no doubt, is good for a house. It is not so good for the inmate' (Quiller-Couch).

The notion that the law of England derives its peculiar merits from its long resistance to codification is so widespread that some justification may seem called for in treating this subject as a current problem. However, we live in an age which, for all its shortcomings, is ambitious of social and legal reform, even if its achievements do not always match those ambitions. Moreover, the bicentenary of the birth of Jeremy Bentham, which we have this year been celebrating, seems an apt moment in which to remind ourselves—if we need any reminding—of the present unwieldy shape of what Cromwell once described as the 'tortuous ungodly jungle' of English law. If the father of modern codification—nay, the inventor of the very word itself[1]—were able to contemplate the present legal scene, he might well feel, so far as the substance of the law was concerned, that he had not wrought in vain; but there can be equally little doubt that the form—or should I say formlessness?—of that body of law would fill him with the acute nausea and indignation which always assailed him when contemplating the spectacle of man wallowing in his love of the irrational. For, on this aspect of the law, whatever lessons are to be derived from the master, have been either studiously ignored or even contemptuously spurned. And so the welter of confusion has grown and still grows with every passing day, and with it a kind of unctuous complacency that enabled a distinguished writer to observe recently that while the law is admittedly 'bulky and technical', that is not 'too high a price to pay for the benefits of a legal

[1] Holdsworth, *History of English Law*, Vol. 11, p. 316. For Bentham's views on codification, see Jeremy Bentham and the Law (1948), pp. 39–42.

system . . . which has enabled the lawyers to construct a body of scientific doctrine which is matched only by that constructed by the classical jurists of Rome'.[2] Can one not hear the very bones rattle with wrath at both elements of that [illegible] jealously preserve the dead bones but the eternal and living spirit escapes us. Then it will be remembered that last year[3] a [illegible] Branch of the Office of the Parliamentary Counsel was set up by the Lord Chancellor to devote its whole time to the preparation of Consolidation Bills and Codification Bills, and the Statute Law Committee was also reconstituted to superintend this process. And so no doubt in due course we shall have some more of those elaborate statutes on isolated topics, which may effect some tidying up here and there, perhaps adding to rather than diminishing the bulk of the law, clearing up some obscurities while maybe creating as many more, but all, rightly or wrongly, in utter contrast to what is understood by a code in other systems of law—not merely un-Benthamlike, but positively anti-Bentham.

It may, however, encourage us a little to explore this subject further when it is borne in mind that the idea of codifying English law is not just a hazy dream of the unpractical theorist, but one which has been urged by some of its outstanding exponents. No one, for example, would suspect Sir Frederick Pollock of a disregard of the traditional character of the common law, and yet he remained a staunch adherent of codes. 'I am a strong believer in codification'—such are his own words.[4] And elsewhere he wrote that 'no better reasons than ignorance, timidity and the extreme cumbrousness of our legislative procedure, stand in the way of our doing it at least as well as our neighbours have done'.[5] Maitland was a great admirer of the German civil code and constantly expressed hopes of seeing such a development in this country, but he saw clearly all the forces of inertia obstructing any fundamental change and was not optimistic of the outcome. 'We in England (he wrote in 1906) are not within

[2] Holdsworth, *Essays in Law and History*, p. 163.

[3] 1947. See *Law Times Journal*, Vol. 204, p. 97. The Lord Chancellor emphasised, in putting the proposal before the House of Lords, that the process would not involve improvements in the substance of the law, but only in its wording and arrangement.

[4] *Essays in Jurisprudence and Ethics*, p. 256.

[5] *Ibid.*, p. 93. Cf. Pollock-Holmes, *Letters*, Vol. 1, p. 8.

measurable distance of a Civil Code. There is much to be done first; and I cannot honestly say that our legislature seems inclined to do it or even to be aware that it wants doing. I wish that Parliament could be persuaded to place itself for a while in the humble position of a teacher of English law—not for the sake of teachers (they don't matter) but *for* the sake of the nation at large. . . . I suppose that we shall "muddle along" somehow, and show our practicality by passing some more of those timid and half-hearted Acts about the transfer of land which are monuments of futility'.[6] Exactly 100 years ago the *Law Times* in a leading article declared that 'the law of England has swollen to an unmanageable bulk. . . . There is but one cure and that is codification'.[7] Then in 1863 Lord Chancellor Westbury favoured a general codification of the law, although his project was frustrated by opposition.[8] Chief Justice Coleridge was also in favour of a code,[9] and Mr. Justice Stephen devoted much of his energies to attempting to spread the gospel of codification. Of the great Indian Codes, which owed much of their form and inspiration to the labours of Macaulay, he wrote that they had 'succeeded to a degree that no one could have anticipated, and the proofs of the fact are, in my mind, conclusive. . . . The only thing which prevents English-speaking people from seeing that the law is really one of the most interesting and instructive studies in the world is that English lawyers have thrown it into a shape which can only be described as studiously repulsive'.[10] And even so hostile a critic of codification as Sir William Holdsworth has conceded that 'these [Anglo-Indian] Codes are one of the most remarkable, and will perhaps be the most lasting, of all the achievements of British rule in India'.[11] A legal writer, with a wide experience of the workings of the legal system both in this country and abroad—Mr. Heber Hart, K.C.—summed up the issue (in 1941) in the following words: 'Law can function as

[6] *Collected Papers*, Vol. 3, pp. 487–488.
[7] See (1948) *Law Times Journal*, Vol. 206, p. 157.
[8] See Mullins, *In Quest of Justice*, p. 136.
[9] *Ibid.*
[10] Cited by Heber Hart, K.C., *Way to Justice* (1941), p. 40. On Macaulay's part in the Indian codification, see Trevelyan, *Life of Macaulay*, Chap. 6. Sir Henry Maine, although in sympathy with the historical school, was not opposed to codification. See his *Speeches and Minutes*, *passim*.
[11] *History of E[illegible]* On the Anglo-Indian codes, see *Jeremy Ben[illegible]* 222–232.

such only in so far

s collection of general propositions arranged in conve order than to discover the correct inferences to be derived from judicial decisions. . . . Why then can any one think that it is reasonable to leave it embedded in the pages of thousands of volumes with the very existence of which no living lawyer is completely acquainted, and from which, in many instances, it can be extracted, if at all, only with great labour and difficulty and resulting uncertainty and confusion?'.[12]

. If then the possibility of reducing the labyrinth of English law within the four corners of a code be once admitted—I shall have something to say later of the practical limits which human weakness would impose upon any concrete scheme of that nature—it may not be without profit to take a brief glance at what other nations have made of this problem. For even if it is true that the Anglo-Saxon and continental systems are the result of 'widely divergent temperaments'[13] it would obviously be as foolish to ignore the experience of other countries in this matter, as for a medical man in England to ignore the results of a physiological experiment because it was undertaken upon persons of a different race and under different conditions of climate and surroundings. Surely the correct view is to take account of the results while making allowance for the varying conditions. I may add that I beg leave to doubt the facile argument based on comparisons of temperament, for I fail utterly to perceive any vital similarity of character or temperament between (say) a Swede and an Italian on the one hand, and an Englishman and a New Yorker on the other. Yet the two former live contentedly under codes of closely similar character, while the two latter are apparently equally content to seek their law from a vast unsystematised body of case-law and miscellaneous statutes. I venture to think that the explanation lies fundamentally embedded in the accidents of history, rather than in basic contrasts of human

concern myself with results, and causes must be left to themselves.

s, Law and Of *Times* *p. 81.*
d, Interpretati *Leg* *pp. 80-81.*

As I am concerned only with modern law I refrain also from making more than a passing reference to the codification of Roman law by Justinian. In the history of codification a large chapter would have to be given to the profound influence on all subsequent codes of what Gibbon described as a 'fair and everlasting monument'[15] of Roman civilisation. Admiration, however, of the Roman achievement in legal science should not conceal the fact that the *Digest*, by its emphasis on particular points rather than general principles, and also its extreme bulk, does not by any means conform to modern notions of codification. The era of modern codification cannot indeed be dated earlier than the great French Civil Code of Napoleon, finally promulgated in 1804.[16] There had of course been previous proposals for codification though, as Maine pointed out,[17] the early law reformers were concerned rather with the reform of law-books than of law. In this respect a modern lawyer may sympathise with the comment of Leibniz that 'in no branch of study are there more books and less matter than in jurisprudence'.[18] Some attempts had been made at actual codifying of the law. Luther had advocated a code compiled from Mosaic law and Gospel precepts,[19] an idea which Calvin went some way towards implementing in the theocracy of Geneva.[20] Even in England a bill had been proposed in Parliament in 1549 to codify the common and statute law.[21] On this abortive project Bishop Burnet wrote in 1681: 'But this was too great a design to be set on, or finished under an infant King. If it was then necessary, it will be readily acknowledged to be much more so now'.[22] Frederick the Great, the apostle of Enlightenment, was responsible for instituting a code in Prussia, based largely on ideas of natural

[15] *Decline and Fall of the Roman Empire*, Chap. 44.

[16] Bonaparte appointed the drafting commission on August 13, 1800, but the *Code Civil* was not published as a whole until March 21, 1804: Amos and Walton, *Introduction to French Law*, pp. 27–28.

[17] *Early Law and Custom*, p. 362.

[18] *Nova Methodus*, p. 222.

[19] See J. W. Jones, *Historical Introduction to the Theory of Law*, p. 35.

[20] J. W. Allen, *History of Political Thought in the Sixteenth Century*, pp. 64–67.

[21] Mullins, *op. cit.*, p. 114. Bacon also proposed a digest of case-law and statute-law from which obsolete matter was to be omitted and the remainder to be pruned. But of codification he said: 'I dare not advise to cast the law into a new mould'. Cf. Holdsworth, *History of English Law*, Vol. [illegible]

law and intended to reduce the administration of justice to a state of mechanical certainty.[23] But all previous attempts at codification were completely overshadowed by the product of Napoleon, the French Justinian, and his lieutenant, Portalis, the French Tribonian. For precision, clearness and simplicity of language the French Code was, and remains still, without a rival. [illegible] to improve his style by reading a chapter of that legal work before sitting down to write his great novels.[24] It must be regretfully admitted that one can hardly picture an English novelist being afforded comparable assistance from a perusal of any portion of our statute book! To an English lawyer the brevity of the *Code Civil* is equally striking. Within the space of one small pocket-sized volume are contained some 2,281 short articles, wherein are laid down general propositions governing such diverse matters as marriage and divorce, interests in property and modes of disposing of them, contract, tort, wills and intestacy, sale, partnership and other similar special contracts, mortgages and other topics which I need not detail now.[25] I will have something to say later of the delusion that the whole of the civil law of France or indeed of any civilised country is or could be contained in so tiny a compass; and indeed the *Code Civil* has been criticised for excessive brevity and economy of language. Still the fact remains that here the Frenchman has, within the covers of a small volume, a concise, and convenient and authoritative statement of the principles of law which govern his daily life. In this way the broad notions of his legal system have been brought home to the ordinary Frenchman while English law remains for the Englishman an obscure and expensive mystery. Moreover, as two learned English commentators with a wide knowledge of the workings of French law, have written recently: 'The esteem [illegible] with which the *Code Napoléon* is regarded in France is plainly indicated by the fact that no

[22] See W. Seagle, *Quest for Law* (1941), Chap. 18. The Code did not in fact come into force until 1794, after Frederick's death.

[24] *Ibid.*

[25] About 300 [illegible] have since been repealed or amended: Amos and Walton, *op. cit.*, p. 15. The text of all the statute-law in force supplementary [illegible] as well as the principle administrative and fiscal statutes [illegible] set out in such a compilation as Carpentier's *Lois Usuelles*, containing about the same amount of matter as the

proposal for its general revision has met with wide support'.[26] '*Il reste debout, imposant et respecté*'.[27] Nor has this affection and respect been confined within the frontiers of France. Whereas English law has been carried to other lands only by English conquerors or colonists, the law of France has been 'disseminated by means of voluntary imitation and free adoption'.[28] To cite language which at this particular juncture of our affairs may have a special appeal, the French have 'done a great export trade in law'.[29] The French Code, and its more recent rival from Germany,[30] have between them shared the dominance of the legal systems of practically all the civilised nations of the world, outside the Anglo-American sphere of influence. Even the codes of Soviet Russia are to some extent modelled, at least as to form, upon the examples of their French and German counterparts, though as to their substance, comparison is a little more difficult, for it has been said [illegible] with some justice, that every Russian Code contains at least one article enabling the judge to disregard all the others.[31]

Before I turn to consider how far this codified system might be applied to the field of English law it is necessary to have clearly in mind what a code cannot be expected to achieve. Modern codes arose out of the Age of Enlightenment in the eighteenth century when it was believed that human reason was a panacea to solve all human problems, and that systems of natural law could be worked out by pure reason alone, and could introduce a mathematical certitude into human affairs.[32] Thus the purpose of Frederick the Great's Prussian Code was to render the whole tribe of advocates and attornies superfluous.[33] Every

[26] *Ibid.*, pp. 27–28.
[27] Esmein, *Code Civil, Livre du Centenaire*, Vol. 1, p. 16.
[28] Amos and Walton, *op. cit.*, p. 2.
[29] *Ibid.*, p. 3.
[30] Published in 1896, it came into force in 1900. The codifiers of Japan, Switzerland and Turkey subsequently chose it as a model for their own codes. On the codification of the civil law of Poland between 1918–1939, see *Studies in Polish and Comparative Law*, pp. 44–69.
[31] J. W. Jo[illegible] *op. cit.*, p. 236. On [illegible] totalitarian régimes in Germany and Italy, see *ibid.*, pp. 298–300.
[32] See O. Gierke, *Development of Political Theory*, pp. 320 *et seq.* Cf. Frank, *Law and the Modern Mind*, pp. 189–190.
[33] W. Seagle, *loc. cit.* Even Bentham deprecated this attitude. 'I see with regret the compiler of the Code of a great nation incessantly occupied in triumphing over the lawyers' (*View of a Complete Code of Law*, Chap. 32).

detail of human welfare was to be ascertained and provided for by natural reason. The final draft of the Prussian Code, which consisted of some 16,000 articles, applied rules to the conduct of private life which might well give pause even to the supporter of the modern welfare state. It was decreed, for instance, that a healthy mother was under a duty to suckle her infant, though [illegible] was entitled, not to do so, but to be [illegible], as to the length of time this was to last.[34] No doubt excesses such as this produced the reaction of the historical school, which rejected the idea that a clean break could be made with the past or that it was either possible or desirable to construct a wholly new or complete system of law for any country *de novo*. Portalis, the pilot of the *Code Civil*, was singularly free from the extravagant notion that a code could contain the whole of the law and even dispense with judicial interpretation.[35] Indeed he scorned the adoption of Article 4, which prohibits a judge from refusing to decide a case 'on the pretext of the silence, obscurity, or insufficiency of the Code'. Nevertheless the illusion gained force in France that the Code was complete in itself and that legal study must be confined to the Code and the Code alone.[36] Recent developments have, however, done much to dispel this idea and to stress the vital function of interpretation.[37] The modern Swiss Code, enacted in 1907, recognises this explicitly by providing that in the absence of an applicable rule of law or custom, '*le juge prononce . . . selon les règles qu'il établirait s'il avait à faire acte de législateur*'.[38]

If it is an illusion that a code can be complete in itself, solve all problems and dispense with judicial interpretation, it is equally chimerical to suppose that a code can be reduced to such simplicity that any layman could obtain a reasonably clear solution of his legal problems by being referred to the appropriate sections of the code. Bentham and his followers were

[34] W. Seagle, *loc. cit.*

[35] To deny a place to the interpretative faculty of the judge was 'to reason as if legislators were gods, and as if judges were not even men'. Fenet, *Recueil complet*, Vol. 6, p. 359.

[36] 'I know nothing of civil law; I only teach the *Code Napoléon*', (Bugnet) was a characteristic assertion.

[37] Largely owing to [illegible] great *Méthode d'Interprétation*, first published in 1899.

[38] Art. 1.

certainly not free from this misconception,[39] and it may be thought that Mr. Heber Hart somewhat overstates the case when he asserts that as a result of codification 'law would cease to be obscure, mysterious and repellent, and become an object of pleasant and satisfactory study to lawyers and laymen alike'.[40] Some part of the complexity and obscurity of law is inherent in the nature of human affairs and cannot be wholly removed by rationalised formulas. To think otherwise is little more than fantasy. But that is not to say that many of the existing complexities are not purely artificial creations that have acquired a momentum of their own, such as all legal systems engender as a result of their traditional technique. There is nothing inherent in human affairs which necessitates a distinction between a trust for sale and settled land. Such refinements—if that is the word—are purely creations of lawyers, though it may require the ruthless determination of a non-lawyer to get rid of them. And it also remains true that those who live under a codified system do, as has been already pointed out, have a better idea, in a general way, of their legal position than is possible under our system, and, moreover, that it is easier under a code for a lawyer to expound to his client what are the considerations which govern his legal position. An English practitioner, on the other hand, usually finds it quite impracticable to explain to his client the difficulty of elucidating, from a mass of reported cases, some clear proposition which governs his particular problem, and is often constrained to refer in general terms to a mysterious background of case-law which creates difficulties too technical to be expounded, and which would be both tedious and incomprehensible to the client, if the attempt were made. In this connection it is curious to reflect that the custom has long existed in England for counsel, when asked to give an opinion, to set forth in writing an elaborate examination of the authorities which conduce to the view there taken—or, unhappily, as is often the case, the doubts expressed, therein—and this opinion is then shown to the lay client by his solicitor. The only effect of this

[39] Bentham, when offering assistance in codification to the U.S.A. in 1817 wrote: 'Accept my services—no man of tolerably liberal education, but shall, if he pleases, know, and know, without effort, much more of law than, at the end of the longest course of the intensest efforts, it is possible for the ablest lawyer to know at present'.

process is perhaps that the lay client goes away with the feeling that law is an inscrutable mystery and that the privilege of resorting to it cannot be expected to be purchased cheaply.

We have spoken of what a code cannot achieve: what then can be attained, and, in particular, what could a code do for our own legal system? It must be admitted in the first place that one of the primary incentives in favour of a code in modern times has been the desire for the legal unification of a State split into a multiplicity of regional legal systems. Both the great codes of France and Germany owed their driving force to this strange survival in their history. Voltaire once remarked that when a man travelled in France he changed laws as often as he changed horses,[41] and it is said of the Germany of 1867 that of every hundred Germans, thirty-three lived under the texts of Justinian, fourteen under the French Civil Code, and the rest under a welter of diverging codes, statutes and local customs.[42] Happily this motive at least is lacking here, and indeed the very existence of a unified state and a unified law over long centuries is without doubt the very basis upon which the individual character of the common law has been wrought, and which has enabled it to resist, for good or ill, both the reception of the old Roman law in the sixteenth century[43] and its successor, the *Code Civil*, in modern times. But assuredly this is not all that can be expected of a code. That a code may still vastly simplify and rationalise the whole body of civil law is manifest from the experience of France and Germany and every state that has [illegible]. As for precepts. 'All law is in writings; the difficulty is to find it'. Thus the problem is summed up epigrammatically by the Law Reform Committee of the Haldane Society.[44] Our judges have repeatedly asserted, when counsel has urged upon them the irrationality of a proposed decision, that it is no part of their task to 'rationalise the law of England'.[45] That is a duty which devolves upon the legislature. Can it be seriously contended, at the present day, that it is more convenient to leave

[41] Mellins, *op. cit.*, p. 125.
[42] J. W. Jones, *op. cit.*, pp. 61–62.
[43] See Maitland, *English Law and the Renaissance*.
[44] Haldane Society's pamphlet, *Law Reform Now* (1947), p. 20.
[45] See, *e.g.*, Lord Macmillan in *Read* v. *Lyons*, [1947] A.C. 156, [illegible] Lord Mansfield's attempts to rationalise the [illegible] according to the weight of previous decided cases; [illegible], *Essays in Law and History*, pp. 154–155.

our civil law[46] to be gleaned from a mass of judicial decisions ranging over centuries, many of them conflicting or separated one from another by a judicial hair's-breadth, interlarded by a heap of miscellaneous, piece-meal and haphazard statute law, rather than to reduce it to a neat rational and consistent whole, from which a new start may be made? You observe that I do not suggest the wholesale scrapping of our law for some entirely novel product to be derived from our own wisdom or that of our neighbours—the new code must be based fundamentally on past experience. A balance has to be struck between the extravagances of Savigny, who regarded all legislation as a harmful interruption of the natural growth of law in the popular consciousness,[47] and the eighteenth century natural lawyers who dreamt of a code born fully-grown, like Athene sprung from the head of Zeus. On the other hand, the code is to be more than a mere restatement of the present law, enshrining all its artificial and superfluous complexities and obscurities. A code should seek to clarify, not petrify doubt. A work such as the modern American Restatement of the Law is no substitute for a code. It may indeed be regarded as the indispensable spade-work upon which a code may be reared, like the working-papers of an accountant, from which he prepares his balance sheet. In the same light we can contemplate the thirty-seven volumes of Halsbury's *Laws of England*: a huge formless mass of rough-cast stone from which the sculptor must hew and carve and finally shape the finished model. It is impossible in the time at my disposal to attempt to show how this may be done in particular cases. So that I may to some small extent quit the field of generalities, let us examine for a moment the character of our law of tort. An English lawyer, after perusing the 961 pages of text of the latest edition[48] of *Clerk and Lindsell*, with its 146-page index of judicial decisions cited—at about forty cases to

[46] I use the term 'civil law' comprehensively to include criminal law. It will be realised of course that no code could possibly extend to cover the subject-matter of administrative and quasi-administrative legislation such as public health, town and country planning, etc. These would in any case have to continue to be dealt with by special enactments, though there remains ample scope here for consolidation, rationalisation, and improvements in draftsmanship.

[47] There is some warrant for the criticism of Merz, that Savigny was so preoccupied with the source of law that he almost forgot the system itself.

[48] *Law of Torts*, 10th ed., 1947.

[illegible] makes nearly 6,000 citations—and then studying [illegible] volumes in which learned lawyers on the other side [illegible] have endeavoured to restate this branch of the [illegible] and then turning to Part [illegible] of Book III of the Civil Code relating to this topic, and there finds this branch of the law enshrined in five brief articles scarcely covering a page of print.[49] Of course I realise fully that this is not the whole story. No one can hope to solve a problem in the French law of tort by a mere perusal of Articles 1382–1386 of the Civil Code. He will have to study the elaborate interpretation to which these articles have been subjected both by the '*doctrine*' and the '*jurisprudence*',[50] and when he has done so he will make many surprising discoveries unattainable by the light of pure reason operating on the Code: for example, that when a driver of a motor vehicle collides with a pedestrian there is an irrebuttable presumption of liability even though the Code makes no reference to such absolute liability, and certainly its authors were not alive to the possibilities of the internal-combustion engine.[51] All this is true, but the fact remains that whereas the Code starts from a few simple general propositions—some have said they are too simple, but this is a point of detail[52]—which the courts apply to new situations as and when they arise, the English courts have to begin from a welter of individual instances, with no guiding star other than a mass of judicial dicta which, as often as not, will be in conflict with one another. So the legal writer or teacher is left with the task of what the Lord Chief Justice has recently described as 'reconciling the irreconcilable'.[53] Is English law or the English temperament really so constitutionally irrational that the English law of tort is incapable of being reduced to a few simple propositions to be embodied in a code? Sir Frederick Pollock declined to think so, and indeed drafted a bill of the law of tort

[49] Arts. 1382–1386.

[50] See Mazeaud, *De la Responsabilité Civile* (1938–1939).

[51] See *arrêt* of *Chambres réunies*, February 13, 1930 (Dalloz, 1930, 1, 57). The decision may make nonsense of Art. 1384, but it also utterly refutes the argument that a code petrifies the law and renders it incapable of developing in the light of changed social conditions. [illegible] has, among others, criticised the 'fallacious brevity' of the *Code* [illegible]

[illegible] d, L.C.J., in *Hibbert* v. [illegible] [1948] 1 All E.R. 860, at

for India, embodying what he conceived to be the basic principles of the English law on this subject—with some modification for its Indian environment—and containing some seventy-three short clauses.[54] Then take our modern law of negligence. *Donoghue* v. *Stevenson*[55] is sometimes referred to as a triumphant instance of the capacity of the common law to adapt itself to modern conditions.[56] Yet when one peruses that case and scrutinises the mass of decisions, extending over a century, which required to be analysed and sifted, distinguished, overruled, criticised and explained before the desired result could be achieved, can one avoid the reflection that here, verily, *parturiunt montes, nascetur ridiculus mus*? For is it conceivable that any modern legislator would not have arrived directly and without effort at a general principle of liability for negligence of which *Donoghue's Case*—be it admitted—is nothing but a fairly obvious illustration? Indeed one may perhaps add that the subsequent exegesis upon that case which later decisions have provided, and which introduce technical distinctions depriving the basic principle of some of its efficacy, illustrate, all too plainly, the danger that case-law is apt 'to turn distinctions of fact into refinements of law'.[57] When the layman is told that if he manufactures and distributes a pair of pants and, as a result of negligence in their manufacture, the ultimate wearer contracts dermatitis, he will be liable to that person,[58] but that if he negligently sells or lets a house with a defective ceiling which falls and injures the occupants he will incur no liability to any one,[59] and in explanation of this odd result is merely told that it is the *ipse dixit* of the law, he may well raise his hands in despair and wonder whether the 'Cadi under the palm tree'[60] might not be an equally efficient, and certainly a cheaper way of dispensing justice.

One reservation we must make, and it is, I think, a vital one.

[54] See Pollock, *Law of Torts*, 13th ed., pp. 618 *et seq.*

[55] [1932] A.C. 562.

[56] So, Sir Ernest Barker, in a broadcast talk (March 3, 1947).

[57] Amos and Walton, *op. cit.*, p. 10.

[58] *Grant* v. *Australian Knitting Mills*, [1936] A.C. 85.

[59] Apart from any liability which might exist in *contract* to the purchaser or lessee. See *Otto* v. *Bolton*, [1936] 2 K.B. 46; following the pre-*Donoghue* v. *Stevenson* decision of the Court of Appeal in *Bottomley* v. *Bannister*, [1932] 1 K.B. 458. Cf. *Travers* v. *Gloucester Corporation*, [1946] 2 All E.R. 506.

[60] Cf. Hart, *op. cit.*, p. 132.

Can we, or perhaps I should say, dare we, undertake any major [illegible] precedent remains unaltered?[61] There are in fact two problems here, and time will only permit me to take the barest glance at them. Firstly, how far should a code supersede the previous body of case-law upon which it is based? The simplest course would be that suggested by Mr. Hart, *viz.*, to forbid any subsequent citation of earlier cases.[62] This idea has been tried in other systems far less attached to precedent than our own and has failed,[63] and I greatly doubt its practicality as applied to a system [illegible] judicial tradition as English law. The most that can probably be achieved is to provide that all previous cases are to be bereft of binding authority and that interpretation is to be based on the code and not on past decisions as such. But what of the subsequent interpretation of the code by judicial decisions? How far is this to be allowed to develop in the same sprawling, haphazard manner as heretofore? Like the town planners, we cannot hope to undo all the follies of the past, but we can at least strive to prevent them being repeated or improved upon by our contemporaries and successors. Undoubtedly one of the greatest contributions to the incredible bulk and complexity of English law is the uncontrolled mass of our case-law. In 1930 the Law Reports alone had attained to about 450 volumes, and this is to say nothing of all the rival reports, and the specialist reports, such as Tax Cases and Reports of Patent Cases. Nor does it take account of the old reports now embodied in 176 huge volumes of 'English Reports,' nor of unreported cases, which are equally liable to be cited and relied upon by the courts if their existence is vouched for by counsel.[64] Nor does it prevent the courts on occasion from calling for the actual record of a case preserved in the vaults of the Record Office, in order to ascertain, in a case of doubt, what was the *ultima ratio* of a decision, or the *ipissima verba* of a document or judicial utterance.[65] And, as we all know, the process still goes on unchecked,

[illegible] nothing that would benefit the legal profession more than [illegible] of codification, unaccompanied by any changes in our [illegible] rules' (Mullins, *op. cit.*, pp. 120-121).

3. Cf. Amos, *An English Code* (1873), p. 63.

[illegible] (see Const., '*Deo auctore*'); and by Frederick the [illegible], *op. cit.*, p. 124).

Kapur, [1953] 2 All E.R. 176.

., [1956] 3 All E.R. 318, at p. 331.

though very occasionally a voice is raised in protest.[66] Professor Goodhart assures us somewhat surprisingly that the 'code-myriad of precedent'[67] does not in fact exist, for, after all, [illegible] volumes 'make a complete working library'.[68] He does, however, concede that some change is called for under the American system, which generously adds about 350 volumes a year to the groaning shelves of American libraries.[69] We may agree with the words, if not the sentiment, of Dr. C. K. Allen, when he asserts that 'the records of our law form one of the world's great monuments'.[70]

What then can be done, or, to put it more practically, what can we really hope to achieve in the sphere of a rational [illegible] and a manageable system of case-law? In 1940 the Law Reporting Committee made the remarkable assertion that 'we do not think any large measure of reform of Law Reporting feasible',[71] and even declared that to limit reports to one publisher would be to strike at the base of 'one of the pillars of freedom'.[72] Indeed the only really concrete proposal put forward was one calculated to increase still further the growing volume of reported cases. This was a recommendation, in a minority report by Professor Goodhart, that all judgments delivered, whether reported or not, should be revised by the judges and recorded and filed in a central office at the law courts, and copies made obtainable on payment of a fee.[73] Of this suggestion the Committee observed that 'it is claimed . . . that there would thus be a complete record of all judgments—a rich field, it is said, in which students and textbook writers, if not practising lawyers, might be expected to browse'. The Com-

[66] See Sir Hartley Shawcross, *The State and the Law* (address to the Haldane Society), reprinted in 1948, 11 *Modern Law Review*, p. 1.

[67] Tennyson, *Aylmer's Field*.

[68] *Essays in Jurisprudence and the Common Law*, p. 57. The use of the word 'complete' is of course open to criticism. Professor Paton's notion (*Jurisprudence*, p. 166) that the wartime destruction of law libraries has reduced the number of authorities cited in court does not unfortunately accord with the facts.

[69] *Op. cit.*, p. 65.

[70] *Law in the Making*, 3rd ed., p. 297. The words of Gibbon on the state of the Roman law before Justinian may be aptly recalled: 'In the space of ten centuries the infinite variety of laws and legal opinions had filled many thousand volumes which no fortune could purchase and no capacity could digest' (*Decline and Fall*, Chap. 44).

[71] *Report of Law Reporting Committee* (1940), p. 15.

[72] p. 16.

[73] pp. 23–29.

mittee then went on to express the trenchant opinion that after cases already reported had been eliminated, 'what remains is less likely to be a treasure-house than a rubbish heap'.[74] The student and the teacher, not to say the practitioner, with visions of those 625 volumes in his working library, may indeed breathe a sigh of relief that the 'rubbish heap' is to remain undug. There are indeed many and obvious ways in which the sheer bulk of the growing pile of volumes can be restrained. Limiting the reports to decision of appellate tribunals, confining them to a single official publication—is it beyond the capacity of a nation that has nationalised coal mines and the means of transport, and even the medical profession, to encompass the humble law reporter?—joint, instead of individual judgments, vigorous editorship excluding cases which are merely factual illustrations of well-recognised principles; these are random suggestions, but they would I think do much to keep those 625 volumes from increasing at a rate which renders it utterly impossible for an ordinary practitioner to keep abreast of developments in his profession. Of codification itself I confess that I can detect few signs of any real desire or urge to heed the voice of Jeremy Bentham. I have already pointed out that the recent proposal for statute-law revision is along the traditional English lines of piece-meal consolidation with which official sentiment seems to be well content. The report of the Committee on the Law of Defamation which has just been published[75] goes far to reinforce this traditional outlook. Commenting on the proposal to codify the law of defamation, the Committee first observes that under the Anglo-Saxon system, codification has been confined to topics which deal with very limited portions of the law, the principles of which are so settled as to have become 'ripe for codification'. On this it may be observed at once that the law of defamation is at least as limited a portion of the law as the sale of goods, and if it is true that, after centuries of development, this branch of the law is still so far unsettled as to be unripe for codification one may well ask whether that unique moment is ever likely to arrive. Further the Committee states, as if it were in itself an argument, that in no instance has the law of tort been codified in any country subject to or influenced by the English common law.

[74] p. 20.
[75] (1948) Cmd. 7536.

But the most conspicuous illustration of the Committee's resolve to have the best of both worlds is the manner in which they comment in one paragraph upon the very general language in which Sir Frederick Pollock's draft bill was compiled and also upon the tendency of foreign codes to treat the law of tort upon broad and vague lines, and then in the very next paragraph go on to assert as their ultimate reason for preferring to maintain the existing form of the law, that 'it is desirable to retain as much flexibility as possible [and that] we fear the rigidity of a code'. One is reminded of what Goldsmith once said of Dr. Johnson: 'There is no arguing with Johnson; for when his pistol misses fire, he knocks you down with the butt end of it'.

Indeed the truth appears to be that far-reaching codification is so arduous an undertaking—the German Civil Code took over twenty years of strenuous preparation[76]—that no Government will assume the burden except in the face of the most pressing public opinion. And far from such pressure existing it may well be that the lay public on the subject of law reform feels 'a kind of fatalistic acquiescence'[77] in what they regard as a mystery which is both inherent and beyond remedy. The layman desires not so much to improve the law as to escape from its clutches. Yet, as Sir Hartley Shawcross has recently pointed out[78] to the annual general meeting of the Bar, it is not a bit of use the lawyers railing at administrative tribunals and their alleged malpractices until they have put their own house in order. It is no doubt justly observed by the Law Reform Committee of the Haldane Society that 'if citizens will only realise that law is not something like a disease, to be avoided, but that it enters into every transaction they undertake, they can demand that in their own interests it should be clear and accessible'.[79] But before that simple truth can be brought home to the lay public the legal profession must be prepared to rid itself of the spirit of self-satisfaction in which, with a few conspicuous exceptions, it has revelled for so long. Only then can it turn to the public at large for that enlightened support which is vital in a democratic nation to the accomplishment of great and arduous undertakings.

[76] 1874–1896. See Maitland, *Collected Papers*, Vol. 3, pp. 474–478.
[77] Hart, *op. cit.*, p. 25.
[78] April 5, 1948. See report in *Law Times Journal*, Vol. 205, pp. 219–220.
[79] *Op. cit.*, p. 25.

THE CONSTITUTIONAL ASPECT OF THE PUBLIC CORPORATION

E. C. S. Wade

Professor Friedmann at the beginning of his two articles on *The New Public Corporations and the Law* which were published in the *Modern Law Review* wrote:

> 'The public corporation is emerging as the chosen legal instrument of the Labour Government for the public control of basic industries in an economy still based on private enterprise'.[1]

I would accept this with two qualifications. The first is that it had become clear before the close of the term of office of the Coalition Government of Mr. Winston Churchill that the public corporation had an important part to play in post-war government, even if the policy did not go so far as that of nationalisation or socialisation. The other is that the term 'chosen instrument' suggests a standard pattern. I doubt if the time is yet ripe to regard the pattern as fixed, despite certain prominent common features in the lay-out of the new corporations. The public corporation has, of course, a long history behind it, like most of our institutions. In the article from which I have quoted, the author goes back only to the Port of London Authority which was set up forty years ago and examines developments in this field abroad and in the sphere of international organisation; he does not trace the institution through our own constitutional history.

Since it is my object in this paper to examine only the constitutional results of the public corporation I must look further back than the recent pattern exemplified by the National Coal Board and its counterpart in the fields of transport, electricity, civil aviation and gas. This wider survey should show that the present constitutional position of the new public corporations is not necessarily stable. I should have liked to

[1] (1947), 10 *Modern Law Review*, p. 233.

have examined the various uses to which modern governments have put the public corporation, had time permitted; it is not possible neatly to classify the various types since experiment by piecemeal approach rather than standardisation is the British way (even the recent creations show this, though to a limited extent). I would ask you to consider these varied uses, purely governmental, regulatory, executive and even cultural. But the effect on ministerial responsibility of the piecemeal growth of organs of this description in a country which has built up a form of parliamentary government such as we knew it at the beginning of the present century is what I would discuss rather than the features of the various corporations which have been so ably covered by Professor Friedmann. It is well to inquire whither the fourth arm of government is leading us—constitutionally speaking.

The Public Corporation, as an agency distinct from the usual form of government department over which a political Minister presides, has evolved in its modern guise from the need for resolving two conflicting considerations—

(a) The demand for some form of State intervention.

(b) The resistance to a form of nationalisation which would involve direct administration by the Civil Service.

Hence the constitutions of these State agencies have been influenced by the desire to safeguard some of the features of private enterprise and to avoid the closer control necessarily involved by direct administration by the State. The former is to be seen in the acceptance of the principle that each public utility corporation (as distinct from the regulatory organs or bodies like the National Assistance Board and War Damage Commission) should conduct its affairs on the basis of paying its way; the latter in the autonomy which each is granted to run the day-to-day administration of its business by a staff which is not in the service of the Crown nor appointed by the machinery of the Civil Service Commission—a staff whose higher ranks are unaccustomed to working to a Minister.

The Public Corporation, though under another name, such as Commissioners for this or Board of that (*e.g.* Sewers, Paving, Turnpike, School Boards, Health Boards), has a long history as an autonomous organ of government, especially in the field now covered by local government. Holdsworth and others

have written of the *ad hoc* body usually created by statute, but sometimes lacking any direct legal sanction which, in the eighteenth century, was neither controlled nor inspected by the central government. The golden age of the constitution from the point of view of balance of power in central government would have meant stagnation indeed but for the growth of local autonomous bodies to give effect to the needs created by the rapid industrialisation of the country. What in the nineteenth century became the public health services of the general purpose authorities—the local elected councils—had their origin, as did highway, police and education services, in the *ad hoc* statutory commissioners of the previous century. The Port of London Authority and the London Passenger Transport Board, the immediate forbears of the post-war corporations for nationalised services, were less novel than is sometimes supposed. Nor is it without significance to the problem of constitutional control of the modern corporation to recall that often those bodies engaged in experiments in developments which, had they been subjected to central administrative or judicial control, would have been restrained. Moreover, the autonomy and independence of these bodies were influenced by the fact that those who served on them were apt to be the same persons as served, or were served by their nominees, in eighteenth century parliaments. This secured an informal separation of powers, such as no formally enacted relationship between the central government and parliament and the local autonomous bodies could have achieved. I need not remind this audience, which has learned to recognise the Reform Act of 1832 as ushering in the era of ministerial responsibility, as we understand it in modern constitutional law, that the early examples of the Poor Law Commissioners and the General Board of Health furnished examples of the administration of public services without any real ministerial responsibility to Parliament, although in the latter case there was an ineffectual attempt to maintain it. That they failed, where a hundred years later the Unemployment Assistance Board, as it was first styled, succeeded, may have been due to other factors rather than to the inherent unsoundness of their constitutional structure. In particular the Unemployment Assistance Board never operated on a falling level of employment.

It is often said by Scotsmen that the English constitutional

lawyer assumes that nothing of importance happens north of the Border, but Scotland can teach us something about government by boards where until comparatively recently they were a prominent feature of public administration. The difficulty of administering a country 400 miles and more from the seat of government was partly responsible for this. Another factor relevant to our topic was that a board was supposed to supply expert knowledge necessary for the management of affairs which were largely technical more adequately than could a government department. The board system in Scotland was criticised by the Royal Commission on the Civil Service in 1914 because it proved ineffective in securing responsibility for official action and also because it left no room for the employment of civil servants of the administrative class. This latter difficulty has not prevented the national boards which were set up in the years between the two world wars from recruiting adequate administrative staffs, though at a high cost. The board system in Scotland was much reduced in the reorganisation of 1928 and, after further condemnation by a departmental committee, finally disappeared in 1937 when all the Scottish departments were brought under the Secretary of State. In the nineteenth century in Ireland, too, public business was largely conducted by boards, few of which came under the full and direct control of Dublin Castle. Here again in 1907 Parliament increased the control of the Chief Secretary over the more important of the boards.

Mention may also be made of the two early twentieth-century experiments in the field of autonomous authorities—the Insurance Commissions and the Road Board. At its inception in 1911, the National Health Insurance Organisation was entrusted to four Insurance Commissions (one for each country in the United Kingdom) and to a National Health Insurance Joint Committee. The functions of the Commissions for England and Wales were transferred to the Ministry of Health on its formation in 1919. At a later date the Department of Health for Scotland became responsible for the work of the Scottish Commission. The Road Board was set up in 1909 under the Board of Trade to make advances out of motor taxation to highway authorities for construction and improvement of roads; the Board also had power, which it was reluctant to exercise, to con-

struct and maintain new roads. The Ministry of Transport formed ten years later took over these powers. It cannot be said either of the Insurance Commissions or of the Road Board that they were superseded because they showed too much independence. They seem to have been sacrificed to the objective of making comprehensive the functions of the new Departments, the Ministry of Health and the Ministry of Transport. But their fate suggests that Boards and Commissions may have their part to play in extensions of State control which do not at the start fit readily into the sphere of any existing Department of State. This is not, however, a necessary guarantee of permanence. In support of this view the year, 1919, which saw the disappearance of the Insurance Commissions and the Road Board was also the date of the formation of the Electricity Commissioners and of the Forestry Commission. The latter has now passed under the control of the Minister of Agriculture, though it maintains a separate corporate existence. The functions of the former have passed to the British Electricity Authority—one of the new public utility corporations.

Thus history until 1919 does not support the view that independent authorities have any very permanent place in the machinery of central government. Sooner or later they are absorbed by a Government Department. On the other hand, they have played their part in extending governmental control to new spheres in an age which, generally speaking, regarded direct State control as objectionable.

I have given this condensed historical review because it shows that independent agencies of government have hitherto had only a transient value. Sooner or later they have disappeared and their responsibilities have passed into the hands of a Department under a Minister to be administered by civil servants or in the case of *ad hoc* local authorities to the general purpose elected authorities with their local government officers and staff. So far then ministerial responsibility has always triumphed. This naturally suggests the question, Will the National Coal Board give way to a new Ministry of Coal on the lines of the G.P.O., or an enlarged Ministry of Fuel and Power? I will only say as to this that it is politically as likely an event as the devolution of the Coal Board's powers to a large number of autonomous coal-producing agencies whether publicly owned or not. But

politics and economics do not always make easy bed-fellows.

Had I time to examine the various uses to which modern governments have put public corporations, I should have tried to show how far the motive, perhaps the principal motive, for employing the device of an independent corporation has been the desire to keep a particular activity out of party politics. This is true of what may be called the cultural activities sponsored by the State such as the B.B.C., the British Council, and the Arts Council of Great Britain. Equally so has it been the case with the Agricultural Marketing Boards and the Livestock Commission which illustrate the regulatory rather than the executive function and also of the Assistance Board and the War Damage Commission, whose functions are strictly governmental in the narrower sense hitherto given to that term. But it is questionable how far it is possible to keep any State-sponsored activity out of politics if and when criticism of its activities becomes insistent. The early history of the old Unemployment Assistance Board shows this. After its teething troubles the Board always batted on a smooth wicket.

Another major factor has been the recognition that there must be some limit to the number of government departments and the number of ministerial posts. Our system could not work if the spoils of political office were available to an excessive proportion of members of the House of Commons. As it is, there is already some danger of this happening, and the large temporary increase in the number of ministerial posts during the war served to draw attention to the matter. Moreover, there is a practical limit to the size of any undertaking; if efficiency is not to be sacrificed to elaboration of structure, an excessive number of tasks cannot be placed on the shoulders of a single Minister and his department. So without unduly increasing the number of ministers and departments we have devised means of undertaking a large number of activities which we must now call governmental activities and for which Parliament therefore must accept ultimate responsibility. How that responsibility looks like working is my theme rather than to analyse in detail the legal structure of the corporations which have been set up in the past three years. I need say little about the legal position of these bodies. With one exception, the Central Land Board, they are not Crown corporations. Their legal liabilities do not

differ from those of any other corporate bodies save that for some unexplained reason three or four of them enjoy modified exemption from the Limitation Act, 1939. They have not even the protection of the Public Authorities Protection Act as amended by the last-named enactment. It is true, however, that some of their principal statutory duties are expressed in terms so general that they cannot be enforced by any known legal machinery; though expressed as legal duties they are really no more than declarations of what is the task allotted.

It must be noted that there are broadly two types of public corporations. Of the social service type I shall say nothing because where public corporations are the executive agents they are under the direct control of the Minister. This is not, of course, the case with the industrial and commercial corporations such as the National Coal Board, the Transport Commission with its five Executives, the British Electricity Authority, the Gas Council or the proposed Iron and Steel Corporation. What we have to answer is this: How can the safeguards of incentive to the worker and the management, of the profit test as a measuring rod of the efficiency of the concern, of the vigilance, such as it is, of the shareholder, be secured if there is substituted parliamentary supervision? Are the recognised methods of parliamentary control sufficiently flexible to deal with these new tasks of controlling instruments of national policy which carry on, as monopolies, industrial and commercial activities with funds contributed in one way or another by the taxpayer?

To some extent the Acts which set up these corporations supply the answer but it is a partial one and, as I shall show, weighted in favour of ultimate ministerial responsibility. Thus provision is made in all cases for appointments to the corporation, and in the case of the Transport Commission also to the five Executives, by a Minister. The choice is his, subject only to a very wide range of qualifications to be possessed by the persons chosen. Members are not to be representative of a special interest. It is therefore for the Minister to decide whether he makes his selection from persons with general qualifications who are known to be not unsympathetic to the trend of development or whether he confines it to the type of man likely to inspire the confidence of the rank and file engaged in the concern. It is obvious that the latter choice might make the relationship between the corpora-

tion and the Minister more difficult. The Minister is empowered, in each case after consultation with the corporation, to give directions of a general character as to the exercise and performance of the functions of the corporation in relation to matters which appear to him to affect the national interest. In some cases he can order a discontinuance of part of its activities. Reorganisation and schemes involving substantial outlay require his approval, though not in detail; so do such matters as programmes to secure training, education and research, while borrowing is subject to Treasury consent. It is the Minister who will have to answer in Parliament in any debate which may arise out of the annual reports which each corporation must render. It is the Minister who can veto the disclosure in these reports of the directions which he may have given to the corporation. Committees to represent consumer interest must report to the Minister, and there is no compulsion for securing that their advice shall be acted upon or even seriously considered. Parliamentary pressure alone can secure this.

All this impressive emphasis upon ministerial power suggests that it will be impossible to keep the affairs of these corporations out of politics on the plea that there is no ministerial responsibility for matters of day-to-day management. The structure of the various Acts suggests that they have been drafted with the maximum emphasis upon ministerial responsibility—in the long run—despite the numerous provisions in the Acts and assertions outside to the contrary. It is of little use for a Minister to resist parliamentary questions and refer the questioner to the relevant corporation if the case for complaint is sufficiently insistent to compel his intervention.

How far then can present methods of enforcing ministerial responsibility be adapted to the new situation without change of form? The matter of parliamentary questions was debated in the House of Commons at some length in March, 1948.[2] It emerged from this debate that there are two separate difficulties:

(1) Whether a Member of Parliament can get a question relating to a public corporation past the scrutiny of the clerks at the Table, *i.e.* whether the question can get on the order paper at all;

[2] 447 House of Commons Debates, cols. 391–456, 3/3/48.

(2) Whether the Minister can be forced to answer.

On the first matter the rules governing the tabling of questions are of considerable complexity; in particular the rule against repetition is important. The relevant passage in *Erskine May* is as follows:

> 'Questions addressed to Ministers should relate to the public affairs with which they are officially connected, to proceedings pending in Parliament or to matters of administration for which they are responsible'.

The rule against repetition prohibits

> 'Repeating in substance questions already answered or to which an answer has been refused'.

Thus even when it is the case that a Minister is not responsible for administration entrusted by statute to a public corporation which he has appointed and to which he can give directions, he can still be asked about any public affair with which he is officially connected. It is impossible to say that the relevant Ministers are not each 'officially connected' with the direction of policy pursued by these corporations. The late arrival of the 9.15 a.m. from Lincoln was frequently cited in the debate on March 3rd, 1948. Granted that it is a matter for the Railway Executive which, under the Transport Commission, operates, through six regional organisations, the railway system. But persistent late running of trains may call for a change of policy involving the intervention of the Minister of Transport under the statute. Such matters as switching priority from train equipment to permanent-way material or stopping the export of railway engines in favour of the home railways may be the only means of curing the persistent dilatoriness of express trains. Sooner or later the matter, if it is worth raising in Parliament, is likely to come within the existing permitted range of parliamentary questions.

The admissibility of questions relating to public corporations has already called for some modification of the practice which guides the clerks at the Table under Mr. Speaker.[3] But the Minister can still dig in his toes and refuse to answer on the plea that the matter is not one for him. It may be suggested that only a foolish Minister will adopt the attitude that his respon-

[3] 446 House of Commons Debates, cols. 1814–1820, 4/2/48.

sibility is circumscribed by the statutory provisions governing his powers. Sir John Anderson's speech in the Commons' debate in March, 1948, is well worth reading in this connection. Just as the Home Secretary may reply to questions arising out of the activities of the Metropolitan Police over which he has no statutory control so far as the exercise of police powers proper, *e.g.* arrest, are concerned, so it may be suggested a wise Minister can but assist the smooth working of a corporation to which he may give directions but whose day-to-day affairs he may not manage, if he is ready to accept a general responsibility or to obtain the desired information from the relevant corporation. The House and Ministers themselves can be trusted to prevent any abuse of so liberal a practice on the part of the persistent seeker after petty details.

But the importance of parliamentary questions can be exaggerated. No private member can by this means be sure that any action will follow as a result of the reply. The alternatives are a short debate on the motion for the adjournment or in extreme cases a formal vote of censure moved by the Opposition. The latter can be dismissed so far as the normal management of public corporations is concerned, though failure to produce coal in reasonable quantities may bring down a Government as well as wreck the National Coal Board. Motions for the adjournment are chancy matters and only rarely attract a moderately-filled House late at night. Some new device is needed if parliamentary control is to be effective. The problem is one which is not confined to the sphere of the new corporations. Parliament is not designed to govern, but it must be in a position to secure the redress of grievances. How can it do this without overburdening itself? The answer is suggested in a different context by a proposal which Sir Gilbert Campion, lately Clerk of the House of Commons, put before the Select Committee for Procedure in 1946. In relation to the control of expenditure on the supply services the proposal was to combine the existing Estimates and Public Accounts Committees into a single Committee on National Expenditure, similar to the wartime committee for this purpose. The Committee would consist of thirty members and would work in small groups, to each of which would be allocated a group of subjects. In the case of the public corporations no estimates are presented to Parliament and their accounts are

audited on commercial lines rather than in accordance with parliamentary practice, for, with the exception of the civil aviation corporations, each is required to pay its own way. Generally speaking then their activities would be outside the scope of the proposed committee. But if Parliament is to play its new role of controlling these instruments of national policy, it may have to evolve some machinery like that proposed by Sir Gilbert Campion for examining the annual accounts of their stewardship rendered by the public corporations. I have seen references to a forthcoming publication by the Fabian Society on an efficiency audit. It may be that the Society is pursuing the same line of thought. It may be objected that such a step would hasten the day when the direct rule of the Minister would have to be substituted for the looser control which he at present exercises. But it may be that in practice the device, by ensuring proper examination by a reasonably small body of the annual reports to Parliament of the various corporations, would postpone that day indefinitely. At all events if public corporations were disposed to act on the strictures of such a committee without the intervention of the Minister, the interests of the public would seem likely to be adequately safeguarded. It is difficult to see how debates in the House itself at intervals never more frequent than once a year can be effective. A more serious objection is that members of the committee would tend to become wholetime professional politicians, but a small competent staff could reduce the work of routine examination as, for example, is done today in the case of the Select Committee on Statutory Instruments. At all events the idea is worth investigating.

There is evidence that all is not well with the day-to-day working of some of these corporations. The fundamental problem is decentralisation into units small enough to operate efficiently. All the emphasis upon ministerial responsibility tends in the other direction. That is the dilemma. Can Parliament control by any device such as I have suggested without hampering decentralisation? Yet with a monopoly, private or public, there must be external control of some sort. Of one thing I am clear, there is a field here for developing constitutional conventions in a relatively small field. If too much emphasis has been put upon ministerial responsibility, it is by conventions gradually evolving rather than by blueprints that the solution lies.

12

THE RIGHT OF PUBLIC MEETING

E. R. H. Ivamy

Like most so-called 'rights' the right of public meeting is not set out in any statute or decided case. In this respect the law of England differs from that of many European States, where special provisions dealing with such a right may be found in their Legal Codes. I propose to discuss the numerous Acts and Regulations which have been passed in relation to the holding of public meetings, for it is only then that we shall be able to see to what extent the right exists.

This paper is divided into four main parts: (1) preparing for the meeting; (2) the meeting place; (3) proceedings at the meeting; (4) the Riot (Damages) Act, 1886; and its scope is confined to the London area.

PREPARING FOR THE MEETING

The first task of the organiser of the meeting is to give notice that it is going to take place. It is enacted by the Metropolitan Streets Act, 1867,[1] that within six miles of Charing Cross no print board placard or notice, except in such manner as may be approved by the Commissioner of Metropolitan or City Police, as the case may be, may be carried or distributed by way of advertisement in any street by any person on foot or riding in any vehicle or on horseback. The penalty for so doing is a sum not exceeding ten shillings.[2] No notice of a meeting may be displayed in a London taxi.[3] A taxi driver who displays such a notice runs the risk of having his licence revoked.[4]

A common method of giving notice that a public meeting is going to take place is by the use of a mobile loudspeaker van. The law on this point is to be found in the Metropolitan Police Act, 1839,[5] s. 54, which reads: 'Every person shall be liable

1 30 & 31 Vict., c. 134, ss. 3, 4, 9.
2 *Ibid.*, s. 9.
3 London Cab. Order 1934, S.R. & O. 1934, No. 1346, para. 14 (l).
4 *Ibid.*, para. 16.
5 2 & 3 Vict., c. 47. In addition to this Act certain districts in the Metropolitan Area have their own byelaws relating to wireless.

to a penalty not more than forty shillings who within the limits of the Metropolitan Police District shall in any thoroughfare or public place commit any of the following offences . . . (subsection 14). Every person except the guards and postmen belonging to Her Majesty's Post Office in the performance of their duty who shall blow any horn or use any other noisy instrument for the purpose of calling persons together'.

In a recent case a motor car containing the defendant stopped in a crowded street. The car was fitted with a loudspeaker and the defendant spoke into a microphone saying: 'Come and support the Communist rally and hear Piratin'. He then gave the time and place of the rally. A small crowd stopped to listen but in any case the defendant's voice could be heard in neighbouring streets. A loudspeaker van had been held in *Adams* v. *Baldwin*[6] to be a noisy instrument, so the question was whether the defendant had used the van for the purpose of calling people together. The magistrate admitted that there was some difficulty in interpreting the Statute, since it was passed in an age when wireless was unheard of, but he held that the loudspeaker had been used to encourage people to come to a future political meeting and so within the meaning of the words 'for the purpose of calling persons together'. The defendant was fined forty shillings with three guineas costs.[7]

There is no doubt that drilling for the purpose of going to a meeting with ease and regularity is lawful but the organisers of the meeting must not drill their followers in such a way that tumult is excited or that resistance to the civil power is offered. If they do so they may be guilty of an offence under the Unlawful Drilling Act, 1819.[8]

Next as to uniforms. During the years 1934 to 1936, especially in the East End of London, public meetings had been graced by a display of coloured shirts of varied hue showing the political or social creed to which their wearers belonged. The most famous perhaps was the Black Shirt, representing the Fascist Party. The *Star* newspaper[9] during this period states that there were seven leading colours. The promoters of a meeting must now

[6] (1935), 79 S.J. 922.
[7] Reported in 12 *Journal of Criminal Law* 341.
[8] 60 Geo. 3 & 1 Geo. 4, c. 1 as amended by the Firearms Act, 1920 (10 & 11 Geo. 5, c. 43). *R.* v. *Hunt* (1820), 3 B. & Ald. 566.
[9] November 5, 1936; green, black, brown, blue, white, grey, red.

refer to the Public Order Act, 1936,[10] which provides that 'any person who in any public place or at any public meeting wears uniform signifying his association with any political organisation or with the promotion of any political object shall be guilty of an offence'.[11] The penalty is imprisonment for a term not exceeding three months or a fine of fifty pounds or both.[12] There is one important proviso: if the chief officer of police is satisfied that the wearing of any such uniform on any ceremonial anniversary or other special occasion will not be likely to involve risk of public disorder he may with the consent of a Secretary of State, by order permit the wearing of such uniform on that occasion either absolutely or subject to such conditions as may be specified in the order.[13]

The Act does not say what is meant by the word 'uniform' and this omission was presumably intentional because the legislature did not wish to fetter the discretion of the courts. Nowadays prosecutions under section 1 for the unlawful wearing of uniforms are noticeably rare though a few were brought in 1937 very shortly after the passing of the Act. These I now propose to examine.

In *R.* v. *Wood*[14] the evidence showed that the defendant had offered newspapers for sale in Leeds. He was wearing a black shirt, a black tie and a peaked cap, to which was affixed a sign showing a flash of lightning and a hatchet bound up with a bundle of rods. These the prosecution said clearly indicated that he was a member of the Fascist Party and thus committing an offence under the Act. The defendant maintained that he was attired in this way as a result of a private contract between him and his employer by which he agreed to sell papers for 2s. 2d. a week for a month and that his clothes were merely 'the livery of a newsvendor'. The action was a test case and the magistrate, holding that Wood was guilty of wearing a political uniform, imposed a nominal fine of 40s.

10 1 Edw. 8 & 1 Geo. 6, c. 6: 'A public meeting includes any meeting in a public place and any meeting which the public or any section thereof are permitted to attend whether on payment or otherwise', section 9 (1).

11 Section 1.

12 Section 2.

13 Section 1 (proviso). It is to be noted that when a person is charged with an offence under section 1 no further proceedings shall be taken against him without the consent of the Attorney General, section 1 (2).

14 (1937), 81 Sol. Jo. 108. Reference should be made to Baker, *Law of Political Uniforms* (1938), pp. 18–27.

The next case to be considered is *R.* v. *Charnley & Others.*[15] Five persons were accused of wearing political uniforms whilst attending public meetings in Hull. They were dressed in dark navy blue pullovers, black trousers, a black belt with a Fascist emblem attached, and red brassards on their left arms. The defendants claimed that only the emblem and the brassard showed that they were members of the Fascist political creed, and these could not possibly constitute a uniform. The stipendiary magistrate held that a uniform might be something less than a complete outfit and bound over the defendants on their own recognizances to be of good behaviour for six months.

This case was followed by *R.* v. *Irvine.*[16] The defendant was distributing leaflets at a street meeting in Birmingham. He was attired in a brown sports coat, flannel trousers, and a black shirt and tie. He was wearing a red arm-band with a Fascist sign attached to it. The defendant was found guilty of wearing a political uniform, was bound over for six months and ordered to pay the sum of 16s. costs.

The first case dealing with the Green Shirt Party was that of *R.* v. *Taylor, Ward & Hawthorne,*[17] which was tried at Luton. Taylor and his followers were wearing green shirts, green collars and green ties, together with green armlets showing that they were members of the Social Credit Party.[18] The defendant said that a distinction might be drawn between the present case and that of *R.* v. *Wood.*[19] It was pointed out that the defendants in Court were wearing substantially the same clothing as on the day of the meeting. The magistrates dismissed the case without retiring. This is the only reported case in which a prosecution under section 1 of the Act has been unsuccessful.

The only other case which concerns the Green Shirt Party is that of *R.* v. *Wright,*[20] which was tried at Lambeth. It was proved that at a public meeting Wright had been dressed in grey flannel trousers, a green collar, a green tie and a green armlet marked with a double 'K' in white. He was wearing a light green shirt whereas the Social Credit Party had adopted

[15] (1937), 81 Sol. Jo. 108.
[16] 81 Sol. Jo. 509.
[17] 81 Sol. Jo. 509.
[18] Founded by a Major Douglas.
[19] *Supra.*
[20] 81 Sol. Jo. 509.

a dark green shirt as its official dress. The Metropolitan magistrate held that Wright was guilty of wearing a political uniform and dismissed the summons under the Probation of Offenders Act, 1907,[21] upon payment by the defendant of £5 5s. costs.

There are no statutory restrictions on the use of flags or banners at meetings, and the only matter which the promoters of the meeting have to take into account is whether the display of such flags is likely to lead to a breach of the peace. The leading case on this subject is *R.* v. *George Dewhurst & Others,*[22] which was the outcome of a public meeting at Burnley 'to embrace the subject of the necessity of Parliamentary Reform'. The supporters of the meeting remained together 'armed with swords, pikes, pikeheads, clubs, firearms, guns, pistols, and other offensive weapons and with inflammatory ensigns and with flags and banners and with music playing for a long time to wit a space of six hours', to the great alarm and terror of the neighbourhood.[23] In the summing-up will be found these words: 'If there are inflammatory flags in an assembly, which flags speak because the language of a flag is a silent speech—it speaks to the eye if not to the ear—if the flag is calculated to raise discontent and dissatisfaction, then all the persons who remain there after full knowledge of the inscription upon that flag, and lend themselves to the purposes of the meeting, doing nothing in order to prevent the mischief which that language so spoken to the eye produces, they are guilty attendants at that meeting unless they take steps in order to repress and counteract the impression which the flag is calculated to make'.[24]

Before the passing of the Public Order Act, 1936,[25] there were no restrictions on the possession of arms by persons attending a public meeting, but the Act of 1936 now enacts that 'any person who, while present at any public meeting, has with him any offensive weapon, otherwise than in pursuance of lawful authority, shall be guilty of an offence',[26] and is liable to be

21 7 Edw. 7, c. 17.
22 (1820), 1 St. Tr. (N.S.) 530.
23 *Ibid.*, at p. 532.
24 *Ibid.*, at p. 597.
25 1 Edw. 8 & 1 Geo. 6, c. 6.
26 Section 4 (1). A person shall not be deemed to be acting in pursuance of lawful authority unless he is acting in his capacity as a servant of the Crown or of either House of Parliament or of any local authority or as a constable or as a member of a recognised corps or as a member of a fire brigade, section 4 (2).

arrested without warrant.[27] No definition of the words 'offensive weapon' is given in the Act, and the task of deciding what is an offensive weapon is left to the Courts.

THE PLACE OF MEETING

I propose to deal with this matter under the following main headings: (1) meetings in Hyde Park; (2) meetings in Trafalgar Square; (3) meetings in parks under the control of the London County Council; (4) meetings on highways and commons; (5) meetings on private ground.

The overriding statute which conveners of public meetings must consider is the Seditious Meetings Act, 1817. This statute enacts that: 'It shall not be lawful for any person or persons to convene or call together or to give notice for convening or calling together any meeting of persons consisting of more than 50 persons, or for any number of persons exceeding 50 to meet in any street, square or open place in the City or Liberties of Westminster or County of Middlesex within one mile from the gate of Westminster Hall for the purpose or on the pretext of considering or for preparing any petition complaint remonstrance declaration or other address to the King . . . on any day on which the two Houses or either House of Parliament shall meet and sit or shall be summoned or adjourned or prorogued to meet or sit . . . and if any meeting or assembly shall be assembled or holden on any such day . . . such meeting shall be deemed and taken to be an unlawful assembly'.[28] This section also forbade the holding of such meetings on any day on which the Courts sat in Westminster Hall, but it is doubtful whether the section applies to meetings held during the sittings of the Royal Courts of Justice.[29]

(1) MEETINGS IN HYDE PARK

It has been established that there is no right in the public to hold meetings in Hyde Park and the other Royal Parks, and that it is only through a favour of the Crown that they are allowed to

[27] Section 7 (3).
[28] 57 Geo. 3, c. 19, s. 23.
[29] Halsbury, *Statutes* (2nd ed.), Vol. 5, p. 615.

do so.[30] By the Parks Regulation Act, 1872,[31] the responsibility for issuing regulations for Hyde Park has been given to the Commissioners of Works. Copies of the regulations to be observed by persons using the Park must be put up in the Park in such a conspicuous manner as the Commissioners may deem best calculated to give information to the persons using the Park.[32] If any person fails to comply with or acts in contravention of any regulations so made he shall be guilty of an offence and liable on conviction thereof to a penalty not exceeding £5.[33] The Regulations at present in force are those made in 1932, of which the principal clauses are the following:—

Para. 19. 'No public address shall be delivered in any place where the assembly of persons to hear the same is likely to cause obstruction to or impede the use of any road, ride or walk by the public or the use of the Park by His Majesty's Forces or by authorised parades processions or assemblies of the public and no such obstruction shall be wilfully caused by any person forming part of any assembly which may have met to hear any such address'.

Para. 20. 'No public address shall be delivered in the Park except in the open space which is bounded by the horse ride running from the Marble Arch to the Victoria Gate thence to the Magazine and by the carriage drive running from the Magazine along the Serpentine to Hyde Park Corner and by the Avenue leading directly from Hyde Park Corner to the Marble Arch'.

Para. 21. 'No public address of an unlawful character or for an unlawful purpose shall be delivered in the Park'.

Para. 22. 'Where a public address is delivered in the Park (a) no words expressions insinuations or gestures of an obscene indecent abusive or insulting nature or of a blasphemous or threatening character shall be used.
(b) No words shall be used or acts done reasonably calcu-

[30] *Bailey* v. *Williamson* (1873), 8 Q.B.D. 118. Cockburn, C.J. at p. 125: 'I always understood that the Parks, at least the Parks to which the Act of Parliament relates, were the property of the Crown and they are so treated in the Act of Parliament which proceeds upon that assumption. I have always understood and believed that whatever enjoyment the public have of these Parks and royal possessions has been an enjoyment which the public have had by the gracious concession of the Crown'.
[31] 35 & 36 Vict., c. 15.
[32] *Ibid.*, s. 10.
[33] Parks Regulation (Amendment) Act, 1926 (16 & 17 Geo. 5, c. 36), s. 2.(1).

lated to cause a breach of the peace or disorderly conduct of any kind in the Park.

(c) If in the opinion of an officer of police not below the rank of Inspector a breach of the peace or disorderly conduct of any kind is likely to arise from the delivery of any public address near to the place where any other public address is being delivered, he may require any person about to deliver or delivering such a public address to move to such other place (not being more than 100 yards distant) within the space defined in para. 20, as he may direct and if such person neglect or refuse to comply with any such requisition he shall be guilty of an offence against these Regulations'.

The regular political speakers in Hyde Park are known to the police, but when a new political party appears on the scene it is the practice of the police to ask for the names and addresses of the speakers.[34]

(2) MEETINGS IN TRAFALGAR SQUARE

No right of public meeting in Trafalgar Square exists and meetings are only lawful if the official Regulations are strictly complied with. The power to make Regulations is vested in the Commissioners of Works, and the following regulations have been made by them under the Trafalgar Square Act, 1844,[35] and the Crown Lands Act, 1851[36]:—

'1. No public meeting shall be held except between 2 p.m. and sunset on Saturdays, or between sunrise and sunset on Bank Holidays and Sundays.

2. (a) No public meetings shall be held unless written notice shall have been sent four clear days beforehand by the Promoters to the Commissioner of Police for the Metropolis specifying the object of the meeting, and the day and hour when it is proposed to be held.

(b) A second notice from the same promoters will not be regarded as valid until their first meeting has actually taken place or been abandoned.

[34] House of Commons O.R., Vol. 450, col. 227 (May 13, 1948). The Home Secretary in answer to a question by Mr. Gallacher asking on whose authority the names and addresses of coloured and Chinese speakers were taken by the police at a meeting in Hyde Park on April 25, 1948.

[35] 7 & 8 Vict., c. 60.

[36] 14 & 15 Vict., c. 42.

3. Speeches shall not be delivered except from places authorised by the Commissioners of H.M. Works and Public Buildings. Speeches shall not be delivered from the South side of the raised base of the Nelson Column, and no person shall be allowed upon the lions.[37]

4. Not more than one meeting will be allowed on the same day, and if notices of two or more meetings are given for the same day preference shall be given to that meeting of which notice shall have been first received'.

(3) MEETINGS IN PARKS CONTROLLED BY THE LONDON COUNTY COUNCIL

By the London County Council (General Powers) Acts, 1890[38] and 1898[39] the London County Council has been given power to make by-laws in relation to the parks, gardens and open spaces vested in or under the control of the Council. These by-laws were made on November 1, 1932, and came into force on April 1, 1933. The by-laws dealing with public meetings are as follows:—

'*38*. No person shall in any open space deliver, utter or read or maintain the right to deliver utter or read any public speech, lecture, prayer, scripture, sermon or address of any kind or description whatsoever or enter into any public discussion or hold or cause or take part in any public meeting except between sunrise and sunset and on the site or sites, if any, approved by the Council and defined by notice boards and shown on duplicate plans deposited at the Home Office and with the Clerk of the Council'.

'*46*. Any person committing any breach of these by-laws shall be subject to a penalty not exceeding £5'.

'*47*. It shall be lawful for any officer of the Council to exclude from any open space any person committing any breach of the above by-laws'.

[37] See Regulations by Commissioners of Works printed in the *Labour Gazette* of November 23, 1914.

[38] 53 & 54 Vict., c. ccxliii.

[39] 61 & 62 Vict., c. ccxxi. Further powers have been given by the London County Council (General Powers) Act, 1935 (25 & 26 Geo. 5, c. xxxiii). Kew Gardens are now under the control of the Ministry of Agriculture and Fisheries: Parks Regulation (Amendment) Act, 1926 (16 & 17 Geo. 5, c. 36), see Royal Botanic Gardens, Kew, Regulations 1927, dated December 15, 1927.

(4) MEETINGS ON HIGHWAYS AND COMMONS

There is no inherent right in the public to meet on a public road. The streets are for the purposes of traffic and any one who interferes with the right of an individual to use the street for the purpose of traffic commits a nuisance. This is an offence under the Highway Act, 1835, s. 72,[40] and is punishable by a fine not exceeding forty shillings. One of the leading cases on this subject is *Homer* v. *Cadnam*.[41] Homer stood on a stool in the highway and addressed a crowd of between 150 and 200 people for the space of one hour. During that period no person could, without considerable inconvenience and damage, have either walked or driven on that part of the highway where Homer and the crowd were stationed, and the highway was thereby during such period rendered less convenient and commodious to the public. There was, however, space outside the crowd and between it and the footpaths for vehicles and foot passengers to pass and repass. Homer was charged under the Highway Act, 1835, s. 72, with causing an obstruction and was found guilty. In delivering judgment Smith, J., said: 'The fact that only a part of the highway was obstructed seems to me to make no difference. That the whole highway was not obstructed does not make what the appellant did any the less an obstruction within the meaning of the section'.[42]

But the mere fact that a public meeting is held on a highway does not necessarily render it unlawful.[43] The sole test is 'Was any obstruction caused?' The Town Police Clauses Act, 1847, s. 28,[44] further enacts that it is an offence 'for any person to place or use any standing place stool bench stall or showboard on any footway'. Such offence is punishable by a fine not exceeding forty shillings or imprisonment for a period not exceeding fourteen days.

Just as the public has no right to hold meetings on the fore-

[40] 5 & 6 Will. 4, c. 50.
[41] (1886), 16 Cox 51.
[42] *Ibid.*, at p. 54.
[43] *Burden* v. *Rigler*, [1911] 1 K.B. 337. Lord Alverstone, C.J. at p. 339: 'The evidence in support of the charge having been partly given, the justices declined to proceed further with the summons on the ground that the meeting being held on a highway was *ipso facto* an unlawful meeting. That ruling goes much too far'.
[44] 10 & 11 Vict., c. 89.

shore,[45] so there is no right to hold meetings on commons.[46] Such meetings are now governed by the Metropolitan Commons Acts, 1866 to 1898.[47]

(5) MEETINGS ON PRIVATE GROUND

No meeting of any sort may be held on private ground without the consent of the owner. A similar rule prevails in the case of private roads. In *Hampstead Garden Suburb Trust Ltd.* v. *Denbow*[48] the defendant sought to hold a meeting on a private road which was vested in the plaintiffs under a private Act of Parliament until it was made up and taken over by the local highway authority. The Court held that the public had no right to use this road even for highway purposes and therefore it was unnecessary to discuss the further question of a possible right of holding a meeting there.

PROCEEDINGS AT THE MEETING

The promoters of the meeting must ensure that no offence is committed under the Unlawful Drilling Act, 1819.[49] By section 1 it is enacted that: 'All meetings and assemblies of persons for the purpose of training or drilling themselves, or of being trained or drilled to the use of arms or for the purpose of practising military exercise movement or evolutions without any lawful authority from a Secretary of State[50] shall be and the same are hereby prohibited as dangerous to the peace and security of His Majesty's liege subjects and of his Government . . . Every person who shall be present at any such meeting for the purpose of drilling any other person shall on conviction be liable to a term of penal servitude not exceeding seven years, or to be

[45] *Brighton Corporation* v. *Packham* (1908), 72 J.P. 318.

[46] *De Morgan* v. *Metropolitan Board of Works* (1880), 5 Q.B.D. 155. Lush, J. at p. 157 'the appellant contended that the Board could not prevent the public from assembling there (*i.e.*, Clapham Common) whenever they pleased for the purpose of hearing sermons, or lectures or addresses religious, political or otherwise. If this argument were sound it would follow that any number of meetings might be held at the same time in various parts of the common, even to the extent of monopolising the whole area to the disturbance of the whole neighbourhood and the exclusion of that portion of the public who desired to use it for the purpose of recreation. We are satisfied that such was not the intention of the scheme which Parliament sanctioned'.

[47] 29 & 30 Vict., c. 122; 61 & 62 Vict., c. 43.

[48] (1913), 77 J.P. 318.

[49] 60 Geo. 3 & 1 Geo. 4, c. 1.

[50] Thus amended by the Firearms Act, 1920 (10 & 11 Geo. 5, c. 43).

punished by imprisonment not exceeding two years. Every person who shall be present at any such meeting for the purpose of being drilled or who shall at any such meeting be trained or drilled to the use of arms shall be liable to be punished by fine and imprisonment not exceeding two years'.[51] 'No person shall be prosecuted by virtue of this Act for anything done or committed contrary to the provisions herein before contained unless such prosecution shall be commenced within six calendar months after the offence committed'.[52]

There are two statutes which prohibit offensive conduct at public meetings. The first is the Metropolitan Police Act, 1839,[53] s. 54 (1) of which enacts that: 'Every person who within the limits of the Metropolitan Police District in any thoroughfare or public place shall use any threatening abusive or insulting words or behaviour with intent to provoke a breach of the peace or whereby a breach of the peace may be occasioned is liable to a penalty not more than forty shillings'. It is to be noticed that this Act does not apply to meetings held indoors on private property.

Wider powers have now been given by the Public Order Act, 1936.[54] 'Any person who in any public place or at any public meeting uses threatening abusive or insulting words or behaviour with intent to provoke a breach of the peace or whereby a breach of the peace is likely to be occasioned is guilty of an offence'.[55] 'Any person guilty of an offence under this Act shall be liable on summary conviction to imprisonment for a term not exceeding three months or to a fine not exceeding £50, or to both such imprisonment and fine'.[56] 'A constable may without warrant arrest any person reasonably suspected by him to be committing an offence under this part (*viz.*, section 5) of the Act'.[57]

[51] The Unlawful Drilling Act, 1819 was not making a new departure. Cf. *Redford* v. *Birley* (1822), 3 *Stark* 76, *per* Abbott, L.C.J. at p. 128: 'It is by no means to be taken for granted that it is lawful for the subjects of this country to practise military manœuvres and exercises under leaders of their own without authority. It is not to be taken for granted that that is law. I believe, on investigation of the subject, it will not be found to be law'.

[52] Section 7.

[53] 2 & 3 Vict., c. 47.

[54] 1 Edw. 8 & 1 Geo. 6, c. 6.

[55] Section 5.

[56] Section 7 (2).

[57] Section 7 (3).

Disorderly conduct at meetings is forbidden. The Public Meeting Act, 1908,[58] enacts: 'Any person who at a lawful public meeting acts in a disorderly manner for the purpose of preventing the transaction of business for which the meeting was called together shall be guilty of an offence, and if the offence is committed at a political meeting held in any parliamentary constituency between the date of the issue of the writ for the return of a member of Parliament for such constituency and the date at which a return to such writ is made he shall be guilty of an illegal practice within the meaning of the Corrupt and Illegal Practices (Prevention) Act, 1883,[59] and in any other case shall on summary conviction be liable to a fine not exceeding £5, or to imprisonment not exceeding one month'.[60] 'Any person who incites others to commit an offence under this section shall be guilty of a like offence'.[61]

The relevant provisions of the Corrupt and Illegal Practices (Prevention) Act, 1883,[62] are as follows: 'A person guilty of an illegal practice . . . shall on summary conviction be liable to a fine not exceeding £100 and be incapable during a period of five years from the date of his conviction of being registered as an elector or voting at any election (whether it be a parliamentary election or an election for a public office within the meaning of this Act) held for or within the county or borough in which the illegal practice has been committed'.[63] 'A proceeding against a person in respect of the offence of a corrupt or illegal practice or any other offence under the Corrupt Practices (Prevention) Acts or this Act shall be commenced within one year after the offence was committed'.[64]

It is to be emphasised that the Act of 1908 conferred no right of arrest, and did not give the holders of a meeting the right to require that an offender should provide them with his name and address. This defect in the machinery of the Act has now been remedied by the Public Order Act, 1936,[65] which has added a further subsection to the Act of 1908: 'If any constable

58 8 Edw. 7, c. 66.
59 46 & 47 Vict., c. 51.
60 Public Meeting Act, 1908, s. 1 (1).
61 Section 1 (2).
62 46 & 47 Vict., c. 51.
63 Section 10.
64 Section 51.
65 1 Edw. 8 & 1 Geo. 6, c. 6.

reasonably suspects any person of committing an offence under the foregoing provisions of this section he may if requested so to do by the chairman of the meeting require that person to declare to him immediately his name and address and if that person refuses or fails so to declare his name and address or gives a false name and address he shall be guilty of an offence under this subsection, and liable on summary conviction thereof to a fine not exceeding forty shillings, and if he refuses or fails so to declare his name and address or if the constable reasonably suspects him of giving a false name and address, the constable may without warrant arrest him'.[66]

It is to be noted that the constable is not bound to act on the chairman's request, but may use his discretion. On July 10, 1947, the Home Secretary, being asked whether he would make clear to the Metropolitan Police that under this section they do not have to take down the names and addresses of hecklers at a chairman's request, replied: 'The instructions given to the police on this subject which are based upon and fully in accordance with the Act provide that a name and address declared to a constable under the Act may be given to the chairman in a case in which the police do not intend to institute proceedings so that those responsible for organising the meeting may prosecute if they wish to do so'.[67]

This practice has recently been exemplified at a meeting at Notting Hill Gate. Mr. Pritt asked whether the Home Secretary was aware that at this meeting a police inspector took the name and address of a heckler on the demand of the chairman of the meeting without any offence against the Public Order Act being committed: that both the inspector and another police officer stated that it was their duty on the mere request of the chairman to take the name and address of any person asking a question and to hand them to the chairman. Mr. Ede replied: 'I am informed that no question of applying the Public Order Act arose at the meeting in question. Complaints were made to the police by the chairman and persons in the audience against one another, and the police advised the persons concerned to exchange their names and addresses to enable their civil remedies to be pursued'.[68]

[66] Section 6.
[67] House of Commons O.R., Vol. 439, Col. 235.
[68] House of Commons O.R., Vol. 451, Col. 169.

There are other pronouncements by the Home Secretary with regard to public meetings which are worthy of notice, among which are the following: 'I have no doubt, indeed I know from conversations which I have had with police officers that they would prefer any duty to this (*i.e.*, the duty of attending public meetings)'.[69] 'I have no power to prohibit the holding of any meeting. It will be the duty of the police to take such steps as are reasonable and necessary to preserve public order and to maintain the peace'.[70] 'I have not the power to prohibit any person from speaking at a meeting, but if any person makes a provocative speech within the meaning of the realm of the law my Hon. Friend can rest assured that the necessary proceedings will be taken'.[71]

It is the frequent practice of holders of public meetings to provide themselves with stewards. Although the Public Order Act, 1936, prohibits quasi-military organisations, section 2 (6) expressly provides 'Nothing in this section shall be construed as prohibiting the employment of a reasonable number of persons as stewards to assist in the preservation of order at any public meeting held upon private premises, or the making of arrangements for that purpose or the instruction of the persons to be so employed in their lawful duties as such stewards or their being furnished with badges or other distinguishing signs'. Stewards may eject disorderly persons from meetings so long as they use only such force as is reasonably necessary in the circumstances. But if a charge has been made for admission to the meeting then the stewards have no right to eject an interrupter and proceedings must be taken against him under the Public Meeting Act, 1908,[72] as strengthened by the Public Order Act, 1936.[73] Any person, therefore, who has paid for admission and has been ejected, even though no unnecessary violence has been used, can sue the promoters of the meeting for revocation of his licence to attend, and for breach of contract, provided that there has been no improper conduct on his part at the meeting.

It is the duty of a police officer to prevent apprehended

69 House of Commons O.R., Vol. 451, Col. 1225, June 3, 1948.
70 House of Commons O.R., Vol. 450, Col. 599, April 29, 1948.
71 House of Commons O.R., Vol. 450, Col. 600, April 29, 1948.
72 8 Edw. 7, c. 66.
73 1 Edw. 8 & 1 Geo. 6, c. 6; for fuller treatment see Baker, *Law of Political Uniforms* (1938), pp. 63–65.

breaches of the peace, and he may require the chairman of the meeting either to close the meeting or to move to another site, if he has reasonable grounds for believing that a breach of the peace will ensue,[74] even though no obstruction is being caused on the highway. If the order is not obeyed, then the offender may be charged with unlawfully and wilfully obstructing a police officer under the Prevention of Crimes Act, 1871,[75] s. 12, as extended by the Prevention of Crimes Amendment Act, 1885, s. 2.[76] On conviction he may be liable to a penalty of £5, or in default of payment to be imprisoned for two months.

When a meeting is held on private premises the police have a right to enter and remain there even against the will of the promoters, when an offence is being committed, or has been committed, or whenever they have reasonable grounds for believing than an offence is likely to be committed.[77]

RIOT

Public meetings may develop into riots either at common law or by statute. At common law a riot involves a tumultuous disturbance of the peace by three persons or more assembling together of their own authority with mutual intent to assist one another against any opposition in the execution of some private purpose, and afterwards actually executing it to the terror of the people whether the act intended is lawful or not.[78] It is sufficient if only one person, of reasonable firmness and courage, was put in fear.[79] All persons who take part in a riot are guilty of a misdemeanour at common law, which is punishable by fine or imprisonment, with or without hard labour, or both.

Riot is made a statutory offence by the Riot Act, 1714,[80] which enacts that if any persons to the number of twelve or more

[74] *Duncan* v. *Jones,* [1936] 1 K.B. 218.
[75] 34 & 35 Vict., c. 112.
[76] 48 & 49 Vict., c. 75.
[77] *Thomas* v. *Sawkins,* [1935] 2 K.B. 249.
[78] *R.* v. *Graham* (1888), 4 T.L.R. 212, 226. In his summing up Charles, J. is reported to have said: 'His Lordship first spoke with regard to the law respecting the disturbance of the peace, and showed that this charge could only be made where three or more persons attempted to execute some enterprise, or executed some enterprise in a violent manner, to the alarm of people; and it did not matter a pin's head whether the enterprise itself was an unlawful one or a lawful one; they must not assert such an enterprise in such a manner as to cause alarm'.
[79] *Field* v. *Receiver of Metropolitan Police,* [1907] 2 K.B. 853, 860.
[80] 1 Geo. 1, stat. 2, c. 5, s. 1.

are unlawfully, riotously and tumultuously assembled together to the disturbance of the public peace it is the duty of the justices of the peace or the sheriff of the county or the mayor to go to the place where the rioters are assembled and make a proclamation in a prescribed form ordering them to disperse. If persons to the number of twelve or more unlawfully, riotously and tumultuously remain or continue together for one hour after such proclamation they are guilty of felony. The present maximum punishment is penal servitude for life. Proceedings must be commenced within twelve months after the offence.[81]

The proclamation must be read in a loud voice.[82] It must be read verbatim and in its entirety.[83] If the proclamation is read more than once the period of one hour is to be computed from the time of the first reading.[84] If any person wilfully and forcibly opposes the reading of the proclamation[85] he too is guilty of felony punishable with penal servitude for life.[86] Even though the proclamation under the Act has not been read the rioters may still be guilty of the felony at common law.[87] In cases where rioters do not disperse after the reading of the proclamation, the magistrates are entitled to call on the military authorities and all private persons to assist them in suppressing the riot, and if such persons refuse they are liable on indictment to fine and imprisonment.[88] Complete indemnity is afforded to such persons if they kill or maim the rioters.[89] A magistrate is not required to ride along and charge with the military or to give orders to the military to fire. Magistrates may supply the King's subjects with firearms in order to suppress a riot, though such course is not in general prudent. They are not bound to hire men to aid in keeping the peace, but only to collect those

81 Section 8.
82 Section 2.
83 *R.* v. *Child* (1830), 4 C. & P. 442. The magistrate omitted the words 'God Save the King' at the end of the proclamation.
84 *R.* v. *Woolcock* (1833), 5 C. & P. 516.
85 The form of the proclamation is: 'Our sovereign lord the King chargeth and commandeth all persons, being assembled, immediately to disperse themselves, and peacably to depart to their habitations or to their lawful business upon the pains contained in the Act made in the first year of King George, for preventing tumults and riotous assemblies. God Save the King'.
86 Section 5.
87 *R.* v. *Fursey* (1833), 6 C. & P. 81.
88 *R.* v. *Pinney* (1832), 5 C. & P. 253, 263.
89 Riot Act (1 Geo. 1, stat. 2, c. 5), s. 3.

who come on reasonable warning. The military officer may act without any magistrate, but no prudent military man would do so, because his acting may be attended with the loss of life; but if a magistrate gives him an order to act, that is all that is required.[90]

The next matter to be discussed is the question of damage caused by a riot. It is enacted by the Malicious Damage Act, 1861,[91] that 'if any persons riotously and tumultuously assembled together to the disturbance of the public peace unlawfully and with force demolish any church or other place of divine worship or any house, shop, mill or any other building or any machinery employed in any manufacture or mining, they shall be guilty of felony punishable with penal servitude for life'.[92] If the rioters merely unlawfully injure or damage such property they are guilty of a misdemeanour and liable on conviction to penal servitude for a term not exceeding seven years.[93]

The other statute dealing with damage by rioters is the Riot (Damages) Act, 1886.[94] Where a house, shop or building has been injured or destroyed, or the property therein has been injured, stolen or destroyed, by any persons riotously and tumultuously assembled together, compensation will be paid out of the police rate of the district to any person who has sustained loss by such injury, stealing or destruction.[95] In fixing the amount of such compensation regard shall be had to the conduct of the said person whether as respects the precautions taken by him or as respects his being a party or accessory to such riotous or tumultuous assembly, or as regards any provocation offered to the persons assembled or otherwise.[96] If a person receives by

[90] *R.* v. *Pinney* (*supra*) at p. 278.
[91] 24 & 25 Vict., c. 97.
[92] Section 11.
[93] Section 12. A person in possession of a firearm or an imitation firearm at the time of his committing an offence under these two sections of the Act commits a further offence for which he is liable to seven years' penal servitude in addition to the penalties under this Act; Firearms Act, 1937 (1 Edw. 8 & 1 Geo. 6, c. 12), s. 23 (2) and 3rd Schedule.
[94] 49 & 50 Vict., c. 38. For a fuller treatment see Baker, *Law of Political Uniforms* (1938), pp. 125–136.
[95] Section 1 (1).
[96] Section 1 (1). *Gunter* v. *Metropolitan Police District Receiver* (1888), 53 J.P. 249 the plaintiff advertised a race meeting which did not take place as the competitors disappeared by a back entrance. When this became known persons who had paid for admission demanded the return of their money. This was refused and a riot ensued. It was held that the plaintiff could not recover because his conduct constituted a 'provocation' within the meaning of the Act.

way of insurance any sum to recoup him the compensation otherwise payable under the Act is correspondingly reduced.[97] It is to be noticed that the Act is not confined to the case of riots committed in public places.

The power to make detailed regulations has been given by the Act to the Home Secretary.[98] The regulations may be revoked and varied from time to time and must in any case be published in the *London Gazette* and every police district, and copies thereof to be at all times sold to any applicant at a price not exceeding sixpence per copy.[99] The latest regulations were made by the Home Secretary on October 1, 1921, and published as S.R. & O., 1921 (No. 1536). All claims under the Act must be made in writing. If the matter arises in the City of London application must be made to the Town Clerk of London; if in the Metropolitan Police District, to the Receiver for the Metropolitan Police District. Claims must be delivered within fourteen days of the damage, though this period may be extended to forty-two days on application to the police authority, with an appeal in case of a refusal to the Home Secretary. Claims must be made in the prescribed forms and the applicant may be required to file a statutory declaration verifying the claim and to produce all relevant documents. No costs will be allowed to the claimant in respect of any expenses incurred in making the claim to the police authority. If the claimant cannot get satisfaction he may bring an action against the police authority for compensation, but if his claim is for less than £100 the action must be brought in the local County Court. The police may make separate awards in respect of the property of the claimant and property not belonging to him.[100]

[97] Section 1 (2).
[98] Section 3 (2).
[99] Section 3 (3).
[100] The most recent case is *Munday* v. *Metropolitan Police District Receiver*, [1949] 1 All E.R. 337 in which the plaintiff recovered £175 damages in respect of property injured by an enormous crowd of persons who started rioting after being turned away from a football match because the ground was full.

13

THE TWILIGHT OF DOMINION STATUS?

RICHARD C. FITZGERALD

THE British Commonwealth of Nations is a unique association. Nothing exactly like it has ever been seen before. As General Hertzog, the then Prime Minister of South Africa, said in his opening speech at the Imperial Conference, 1926, '. . . it is . . . a Commonwealth of free and independent nations, each free and striving to attain what is best for itself, yet in such a manner and in such a spirit as will conduce wherever and as much as possible to the well-being of all'.[1] He then went on to say that the principle which should guide us in matters of general Commonwealth interest is unrestrained freedom of action to each individual member of the Commonwealth; in practice, consultation with a view to co-operative action wherever possible. That guiding principle is evident in the definition given by the Imperial Conference, 1926, of the position and mutual relation of the group of self-governing communities composed of the United Kingdom and the Dominions, and reading as follows:—

> 'They are autonomous Communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations'.[2]

As stated in the Report of the Imperial Conference, 1926, a foreigner endeavouring to understand the true character of the British Commonwealth by the aid of this formula alone would be tempted to think that it was devised rather to make mutual interference impossible than to make mutual co-operation easy. But he would only be tempted to think on these lines if he were ignorant of the manner of evolution of the Dominions. Equality

[1] Parliamentary Papers, 1927, Cmd. 2769, pp. 24–25.
[2] Report of the Imperial Conference 1926, Parliamentary Papers 1926, Cmd. 2768, pp. 12–36.

of status could not be attained in the British Commonwealth by way of federation—geographical and other considerations precluded that—it could only be attained by the way of autonomy. Recent events have, on the whole, proved the accuracy of the statement of the Imperial Conference, 1926, that 'Every self-governing member of the Empire is now the master of its destiny. In fact, if not always in form, it is subject to no compulsion whatever'.[3] Of what other organisation in the world can it be said that its members are the masters of their respective destinies? Can a State secede from the American federation: is a Soviet Republic subject to no compulsion whatever? Many people, both at home and abroad, have the habit, every time that a problem arises in the British Commonwealth, of saying 'It is the end of the British Commonwealth'. This attitude indicates either that they are people who lack the courage to face new difficulties or, if they have the courage, that they wish, for one reason or another, to see the end of the British Commonwealth. Well, no matter to which group they belong, their fears or hopes (as the case may be) are not likely to be realised. The British Commonwealth 'depends essentially, if not formally, on positive ideals. Free institutions are its life-blood. Free co-operation is its instrument. Peace, security and progress are among its objects'.[4] The actual or attempted achievement of positive ideals is always bound to give rise to new problems in the fields of international law and national law. Of course, if the British Commonwealth were dissolved, it would be relieved of the duty to solve such problems, and we should then have, as Lord Balfour pointed out, 'a collection of enlightened self-governing communities, in friendly relation with each other, having some memory of a common ancestry, and common institutions, but in no way bound together by those ties which it is easy to criticise'.[5] But, again to use the words of Lord Balfour, that 'is not a solution which, if things are managed properly, any self-governing part of the Empire [Commonwealth] will ever support'.[6] The operative words in that statement are 'if things are managed properly', and it is

[3] *Ibid.*
[4] *Ibid.*
[5] Lord Balfour on the Report of the Imperial Conference, *Journal of the Royal Institute of International Affairs,* July 1927, pp. 212–213.
[6] *Op. cit.*

against the background of those words that one must, to some extent, look at recent events.

First, the promotion to the rank of Dominion of Ceylon,[7] India[8] and Pakistan.[9] It is indeed a matter for sincere congratulation that these three Asiatic countries now enjoy equal status in the British Commonwealth with the United Kingdom, Canada, Australia, New Zealand and South Africa. Quite apart from the promises made by the United Kingdom Government during the second World War, the importance and development of these three countries have made such great strides that they have well earned the honour that has been conferred upon them. It is interesting to note that each of the three new Dominions acquired equality of status by way of an Act of Parliament, and not, as was the case with the other Dominions, by appropriate changes in the field of constitutional convention. The United Kingdom Government now have no responsibility for the government of Ceylon, India and Pakistan. Each of them has become an autonomous community in the British Commonwealth, which position, of course, carries with it the obligation at all times to remember that they are equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs. Pakistan, with her eighty million inhabitants, is the largest Muslim State in the world, and one can readily appreciate her determination to resist any external pressure. India, with her three hundred million Hindus, may not have completely overcome her initial dislike of the birth of Pakistan, and any feelings of distrust on either side are assisted by the fact that there are some thirty-five million Muslim subjects in India, and some ten million Hindus in the eastern part of Pakistan. But these two neighbouring Dominions must live together in a spirit of mutual respect and understanding if they wish to avoid the risk of undermining their future welfare. At one time the British Commonwealth had to face the possibility of open war between these two partner States over the accession of the State of Kashmir to India in October, 1947, in spite of the fact that, from the point of view of population, Kashmir is predominantly Muslim. Inter-Dominion open warfare would have been an

[7] Ceylon Independence Act, 1947—11 Geo. 6, c. 7.
[8] India Independence Act, 1947—10 & 11 Geo. 6, c. 30.
[9] *Ibid.*

unpleasant novelty, but the will to peace on the part of these two Dominions was strong enough to lead them to accept the plebiscite for Kashmir formulated by the United Nations Commission on India and Pakistan in its resolution of January 5, 1949. One can hope with some degree of confidence that the cease-fire order which was informally brought into force on January 1, 1949, will become a permanent truce. From the point of view of the British Commonwealth itself, it is regrettable that the intervention of the United Nations was necessary, even although such intervention will most probably lead to successful results. The United Nations Commission will be the body responsible for seeing that the principles it has laid down for the plebiscite are applied in a manner satisfactory to both Dominions. In other words, the absence in the British Commonwealth of machinery for settling Inter-Dominion disputes has forced two Dominions to take their troubles to an outside organisation. Having regard to the extent to which that organisation is subject to the stresses and strains of power politics, one instinctively feels that it would be preferable for disputes between partners in the British Commonwealth to be regarded as partnership matters and dealt with by the British Commonwealth, through its own machinery, as domestic matters. The creation of new Dominions is always bound to give rise to fresh problems, and these problems, caused as they are and will be, by Commonwealth action, should be solved by a Commonwealth tribunal or conference. It is a responsibility which should not be shifted to any other organisation or tribunal. The Imperial Conference, 1926, expressed the view that the mutual relations between the members of the British Commonwealth are not governed by international law, and the Conference on the Operation of Dominion Legislation and Merchant Shipping Legislation, 1929, was impressed with the advantages which might accrue from the establishment of a tribunal as a means of determining differences and disputes between members of the British Commonwealth.[10] This opinion was considered by the Imperial Conference, 1930, which made the following proposals:—

(1) In order to avoid too much rigidity *ad hoc* arbitration proceedings would be more suitable than the constitution of a permanent Court.

[10] O.D.L. Report, Cmd. 3479 (1930), para. 125.

(2) In the absence of general consent to an obligatory system, a voluntary system should be adopted.

(3) The competence of the tribunal should be limited to justiciable differences between governments.

(4) (a) The tribunal should be constituted *ad hoc* in the case of each dispute to be settled.

(b) There should be five members, including a chairman, none drawn from outside the British Commonwealth.

(c) One member, who holds or has held high judicial office or is a distinguished jurist, should be selected by each party to the dispute from outside its own country, and one member by each party from any part of the Commonwealth.

(d) The chairman should be selected by the four members so chosen by the parties, as to whom they should have complete freedom of choice.

(e) If the parties to the dispute so desired, the tribunal should be assisted by the admission as assessors of persons with special knowledge and experience in regard to the case brought before the tribunal.

The adoption of these or similar proposals would have avoided foreign intervention in the Kashmir dispute, and might help to solve the problem referred to by Mr. St. Laurent, the Canadian Prime Minister, in his broadcast of February 3, 1949, viz., the amendment of the British North America Act, 1867—the Canadian constitution. At the request of Canada, the Statute of Westminster, 1931,[11] expressly provides that nothing in that Act shall be deemed to apply to the repeal, amendment, or alteration of the British North America Acts, 1867–1930, and consequently an Act of the United Kingdom Parliament is still necessary to amend the Canadian constitution. This technical inequality of status is entirely due to the Canadians themselves, and is one the complete disappearance of which would be welcomed by the United Kingdom. The question of the procedure to be followed by Canada for amending her own constitution was considered by a Dominion-Provincial Conference in 1935 and certain proposals were made, which were

[11] 22 Geo. 5, c. 4, s. 7 (1).

dropped in 1936 because of the opposition of New Brunswick.[12] Would not a Commonwealth Tribunal, established on the lines indicated above, greatly assist Canada and her Provinces to find a solution? The Judicial Committee of the Privy Council is not a suitable body. Its advice in the past to the Sovereign on disputes arising out of the Canadian constitution has done far more damage than good to the working of that constitution, and its membership is not on a broad enough basis to satisfy the other partner States in the British Commonwealth.

While there can be no possible doubt that in granting Dominion status to these three Asiatic countries 'things have been managed properly', can one truthfully say the same about the steps that have been taken to deprive Newfoundland of Dominion status? Because of financial difficulties, Newfoundland ceased from February 16, 1934, to enjoy Dominion status. A Royal Commission representing Newfoundland, Canada and the United Kingdom recommended that the then existing Constitution of Newfoundland[13] should be suspended, the government of the territory to be vested in a Commission under the control of the United Kingdom Government.[14] Now, in 1930 it had been agreed that by constitutional convention no law should be passed by the United Kingdom Parliament extending to a Dominion, as part of the law of that Dominion, except at the request and with the consent of that Dominion. This convention was affirmed by the third paragraph of the Preamble to the Statute of Westminster, 1931, and applied to all the Dominions, including Newfoundland. It was thought that the recommendations of the Royal Commission could only be put into effect by legislative action of the United Kingdom Parliament, but that Parliament was precluded by the constitutional convention from doing so without appropriate action on the part of Newfoundland. Consequently the Newfoundland Parliament passed an Address to the King requesting legislation by the United Kingdom Parliament, which request was complied with by the passing of the Newfoundland Act, 1933,[15] the

[12] Professor R. MacGregor Dawson, *The Government of Canada* (1947), p. 148.

[13] Granted by Letters Patent in 1876, amended in 1905, and not, as in the case of the other Dominions, by an Act of the United Kingdom Parliament.

[14] Cmd. 4480 (1933).

[15] 24 Geo. 5, c. 2.

Preamble to which recites that the Address had been passed by the Newfoundland Parliament, the Address itself being the First Schedule to the Act. In the new constitution given to Newfoundland by the Letters Patent and Instructions issued on January 30, 1934, pursuant to the power contained in the said Act of 1933, power to make laws for the peace, welfare and good government of Newfoundland was vested in the Governor acting with the advice and consent of six Commissioners constituting the Commission of Government. The Governor and Commission were given power to repeal or amend any law which had been passed by the previous legislature, but they were not expressly stated to be a legislature or Parliament, or to possess all the legislative powers of the previous legislature in Newfoundland. It is quite obvious that, although Newfoundland remained, legally, a Dominion,[16] she no longer satisfied all the requirements of the 1926 definition. She was still united to the British Commonwealth by a common allegiance to the Crown, and she was still freely associated, but that vital element of Dominion status—equality—had disappeared. Newfoundland had become subordinate to the United Kingdom in some aspects of her domestic and external affairs. It has always been asserted that the old constitution had merely been suspended for an indefinite period, so one is entitled to assume that at the time of suspension it was contemplated that in due course Newfoundland would resume Dominion status. But what has happened? The second World War brought economic prosperity to Newfoundland, and since 1941 she has been self-supporting, with the result that she should no longer be ruled by a Commission. A National Convention was elected with authority to inquire into conditions in Newfoundland and to make recommendations to the British Government. A delegation from the National Convention discussed the question of union of Newfoundland and Canada, and in October, 1947, Mr. Mackenzie King, the then Canadian Prime Minister, submitted proposals contained in the 'Arrangements for the entry of Newfoundland into confederation'. On July 3, 1948, a referendum was held to ascertain

[16] Section 1 of the Statute of Westminster, 1931, defines 'Dominion' as meaning, *inter alia,* Newfoundland, and that section has not been amended to omit Newfoundland, and section 11 of the Statute of Westminster, which expressly provides that the expression 'Colony' shall not include a Dominion, still extends to Newfoundland.

whether Newfoundland wished the Commission form of government to continue, or to regain self-government, or to confederate with Canada. The result showed that the Newfoundland electorate certainly did not want the Commission form of government to continue, but no satisfactory indication was given on the other two alternatives, so seven weeks later (*i.e.*, on July 22) another referendum was held, when the electorate voted as follows:— for confederation, 78,323; for self-government, 71,334. Of the twenty-five electoral divisions, eighteen were in favour of confederation and seven were against it. The terms for confederation before the electorate were the proposals of Mr. Mackenzie King just referred to. The electorate are clearly very evenly divided on this important matter, and there are two grounds for suggesting that no further steps should be taken for confederation as a result of these referenda. First, the British North America Act, 1867, expressly provides that it shall be lawful for the Sovereign, by and with the advice of the Privy Council, on Addresses from the Houses of the Canadian Parliament and from the Houses of the Newfoundland Legislature, to admit Newfoundland into the Union, on such terms and conditions as are expressed in the Addresses and as the Sovereign thinks fit to approve, subject to the provisions of the Act.[17] As already pointed out, the Governor and Commission were not expressly stated to be a legislature, and at the present time there is no Newfoundland Legislature, so no Address to the Sovereign from such a body is possible, with the result that the statutory provision cannot be complied with. On this basis, union with Canada, as the result of the July, 1948 referendum, would be unconstitutional. That is looking at the matter from the legal point of view. But there is another angle. At the date of the 1934 Agreement, Newfoundland and the United Kingdom were equal in status—they were members of the British Commonwealth. The commission system of government was intended to put Newfoundland on her economic feet, not to make her a pawn in some political game. Surely the Commission has no right to accept a vote of 52 per cent of the electorate as entitling it to act for Newfoundland on such a vital matter as to whether

[17] Section 146. The representation of Newfoundland in the Canadian Senate, should Newfoundland join the federation, is dealt with by section 147 of the 1867 Act, as amended by section 1 (1) (vi) of the British North America Act, 1915.

or not Newfoundland should become the tenth Canadian Province? Members of the Commonwealth must realise that they are equal partners, and that they must be just and faithful to one another in all their dealings. Newfoundland is not being accorded the treatment to which she is entitled. No one suggests that union with Canada will be a bad thing for Newfoundland. In actual fact, it might be a good thing. The legal currency of Newfoundland is Canadian, so are the banks,[18] and most of the insurance companies. Canadian universities open their doors to Newfoundland students, and Canadian fishing fleets are to a great extent manned by fishermen from Newfoundland. In 1867 it was considered possible that Newfoundland would link up with Canada, hence the express provisions in the Canadian Constitution, and if and when Newfoundland does become a Canadian Province it will really be 'the final phase of an evolutionary movement'.[19] But Newfoundland should be allowed to settle her future for herself, and the right thing to do is to repeal the Newfoundland Act, 1933, and restore Dominion status to Newfoundland, leaving her to elect her own legislature, and for that legislature to act on her behalf in all things. The total result of the two referenda held in June and July, 1948, with approximately 141,000 in favour of union, and approximately 140,000 for self-government, is such that it is quite possible that a duly elected Newfoundland legislature would not decide in favour of union. The terms for union finally agreed between the Canadian Government and the Newfoundland Delegation are very fair, and the Ottawa Correspondent of the London *Times* newspaper states that 'It is thought by many that a vote taken now in the light of the actual agreement would probably get much more support in Newfoundland'.[20] All Canadians, however, are not happy about what has happened. The first leading article in the Toronto *Globe and Mail* of January 14, 1949, after examining the procedure which is being followed to bring Newfoundland into the Canadian federation, goes on to say, 'This may be taken as a certainty: that if Newfoundland is brought into Canada by any method open to criticism as undemocratic or unconstitutional, an anti-confederation party

[18] Except the Newfoundland Savings Bank.
[19] '*Future of Newfoundland*', *Times* newspaper, January 19, 1949.
[20] '*Canadian Political Changes*', *Times* newspaper, January 26, 1949.

in the island will forever be able to argue that union was railroaded and that the island's economic troubles (which will not end soon) are due to the forced marriage. Such are the future troubles in the family invited by the procedure now in view'.[21] Was the late Professor A. Berriedale Keith right when he wrote, '. . . that one of the least satisfactory features of the position since 1895 has been the various obscure intrigues by which politicians and capitalists in Newfoundland and Canada have endeavoured to create a position suitable for bringing the island into the Dominion. Much money has been in this way expended with none but unsatisfactory results'?[22] Former members of the Newfoundland Legislature have taken out a writ against the Commission of Government, seeking an injunction to prevent the Commissioners from taking further steps towards confederation. Their application was dismissed by Mr. Justice Dunfield on December 13, 1948, when he declared that the statement of claim was 'a dead horse, and flogging it will not bring it to life', and that the action was based on 'fundamental errors of law and logic. Legally, logically, and practically it seems to be nonsense. The pleadings disclose no cause of action and can be struck out and stayed or dismissed as frivolous and vexatious'.[23] Appeal was made to a full Bench of the Newfoundland Supreme Court and dismissed, and an appeal is now being taken to the Judicial Committee of the Privy Council. Whatever the outcome may be, no person considering the matter of Dominion status in the light of what has happened to Newfoundland can unhesitatingly say that things have been managed properly. Newfoundland is not the mistress of her destiny: for her, it is apparently the total extinction of Dominion status.

We must now turn to the other aspect of the 1926 definition, *viz.*, the union of the members of the British Commonwealth by a common allegiance to the Crown, the Crown being the symbol of the free association of the members of the British Commonwealth. This is a matter of the utmost importance.

Mr. P. McGilligan, moving the approval of the Report of the Imperial Conference, 1930, in the Irish Free State Dail on July 16, 1931, and, in effect, speaking on the Statute of West-

21 *Times* newspaper, January 15, 1949, and the letter in the same newspaper dated January 21, 1949, from Sir Alan Herbert, M.P.
22 *The Dominions as Sovereign States* (1938), pp. 98–99.
23 *Times* newspaper, December 14, 1948.

minster, 1931, stated that the twelve or thirteen pages of the Report relating to the relations between the United Kingdom and the other members of the British Commonwealth were 'the last chapter in the history of one of the most highly organised and effective legal systems of which there is any record. . . . it was the purpose of the Conference of 1929 that the whole legal machinery of the old Colonial Empire should be taken asunder in so far as the Commonwealth of Nations was concerned'.[24] As he said later in the same speech, the object of the Statute of Westminster was to make the law, the legal position, square with the central and predominant political fact of absolute freedom and unequivocal co-equality. His concluding words were that from the point of view of the Irish Free State the whole aim of the Imperial Conferences, 1926, 1929 and 1930, was to get completely rid of any power, either actual or feared, that the British Government had in relation to the Irish Free State. In substitution for that, under the Anglo-Irish Treaty of 1921, 'there was accepted the monarchy . . . a monarchy in every respect, in relation to Irish affairs, subject to the control of an Irish Government'. To make certain that the risk of any intervention by the British Government was completely eliminated, steps were taken that advice tendered to the King should be communicated direct to His Majesty, and not through the channel of any British Minister, and a seal was struck in the Irish Free State to be used on all documents on which the Great Seal of the Realm had hitherto been used, this seal to be kept and controlled in the Irish Free State. Steps of a similar nature were taken by South Africa when she passed her Royal Executive Functions and Seals Act, 1934.[25] But the acceptance by the Irish Free State of the monarchy did not mean that she had the same ideas about the oath of allegiance as politicians in the United Kingdom had. The High Commissioner for the Irish Free State on March 22, 1932, sent a communication to the Secretary of State for the Dominions in which he stated, *inter alia,* that the oath of allegiance was not mandatory in the 1921 Treaty, that it was a relic of medievalism; and that the people of the Irish Free State, to whom the abolition of the oath was the principal and dominating issue at the election, had

[24] Irish Free State Dail Debates, July 16, 1931, pp. 2290–2308.
[25] South African Statutes, 1934, No. 70.

declared their will without ambiguity. Needless to say, the Secretary of State for the Dominions[26] did not agree with those contentions, and it is interesting to note, in view of what is happening now, that in his Dispatch to the Minister for External Affairs, dated April 9, 1932, the Secretary of State for the Dominions stated, 'As to the future, His Majesty's Government in the United Kingdom feel it sufficient to state that, in their opinion, there can be no conceivable hope for the establishment of a united Ireland except on the basis that its allegiance to the Crown and its membership of the British Commonwealth will continue unimpaired'.[27] The 1932 Anglo-Irish Dispute caused concern in the other Dominions, and correspondence passed between them and the Irish Free State. In the Note sent by the Australian Government to the Irish Government, attention was drawn to the fact that the British Commonwealth, 'composed of self-governing peoples with sovereign rights, has been built up by the united efforts and willing co-operation of this great group of sister nations' and the hope was expressed 'that no action will be taken that could endanger the existing unity of the British Commonwealth of Nations and the relationship of the Irish Free State to the sister Dominions and the United Kingdom'.[28] Similar views were expressed by General Hertzog,[29] and in each case suitable replies were sent by Mr. de Valera. The oath of allegiance was nevertheless abolished by the Constitution (Removal of Oath) Act, 1933. It was clear beyond all shadow of doubt that the days of the Anglo-Irish Treaty, 1921, were numbered. In 1921 Southern Ireland wanted to be associated with the British Commonwealth for matters of common external concern to the members of the British Commonwealth, these matters including, according to Mr. de Valera's Document No. 2, the important topics of defence, peace and war. This was the doctrine of external association, which would have made that part of Ireland a sovereign independent State, but externally associated with the British Commonwealth provided that her status, in that capacity, was not less than that of the partners of the Commonwealth. But it was not to be.

[26] The Rt. Hon. J. H. Thomas, M.P. See his Dispatch to the Minister for External Affairs, Irish Free State, of March 23, 1932. Cmd. 4056.
[27] Cmd. 4056.
[28] *Times* newspaper, April 5 and 11, 1932.
[29] *Ibid.*, April 9, 1932.

Mr. Lloyd George wanted Southern Ireland to have Dominion status, and she had it. But, as Professor N. Mansergh has written, 'What place was there for an inflamed self-assertive Irish nationalism in full and equal partnership with a British Commonwealth composed of States peopled for the most part by immigrants from the British Isles? Ireland herself was a mother country and for that reason, if for no other, felt she had little in common either psychologically or culturally with the oversea Dominions'.[30] There was no need for surprise when Mr. de Valera took advantage of the Abdication crisis of 1936 to revive his Document No. 2. During the afternoon of December 11, 1936, he introduced two Bills in the Dail. The first was the Constitution (Amendment No. 27) Bill, 1936, which provided for the removal of the King from all the internal activities of the Irish Free State, and the abolition of the office of Governor-General of that Dominion. The new constitutional position of the King was dealt with by the second Bill, the Executive Authority (External Relations) Bill, which provided that so long as the Irish Free State was associated with Australia, Canada, the United Kingdom, New Zealand, and South Africa, and so long as the King recognised by those nations as the symbol of their co-operation continued to act on behalf of each of those nations for the purposes of appointing diplomatic and consular representatives, and the conclusion of international agreements, such King was authorised to act on behalf of the Irish Free State for the same purposes as and when advised by the Irish Executive Council to do so. The King referred to was that person who, if H.M. King Edward VIII had died on December 10, 1936, unmarried, would for the time being be his successor under the law of the Irish Free State. These two Bills were passed[31] and so put the doctrine of external association into operation. The Irish Free State had virtually become a republic within the Commonwealth, without consultation with the other members of the Commonwealth. The view of Mr. de Valera was that no other State was interested or had the right to be interested. But, with typical Irish logic, he said there was not in the Bills any

[30] *The Implications of Eire's relationship with the British Commonwealth of Nations, International Affairs,* Vol. 24, No. 1, January, 1948.

[31] They are Constitution (Amendment No. 27) Act, 1936, No. 57 of 1936; and Executive Authority (External Relations) Act, 1936, No. 58 of 1936, respectively.

proposal to sever their connection with the Commonwealth. Professor K. C. Wheare is of the opinion that as Article 2 of the 1921 Treaty conferred upon the Irish Free State the same status as the Dominion of Canada, then so long as Canada accepted the monarchy, the Irish legislature possessed no power to abolish the monarchy completely in respect of the Irish Free State, to secede from the Commonwealth, or to abolish the office of Governor-General. On this line of argument, the 1936 Irish Act abolishing the office of Governor-General was invalid, but the 1936 Act recognising and regulating the functions of the King as regards external relations was valid.[32] The next step was the preparation by Mr. de Valera of a new constitution which was approved by the Dail (not enacted by the legislature) and accepted by a majority of the electorate at a referendum held in 1937. Under this constitution a new State—Eire—came into existence, which by Article 5 of the Constitution is declared to be 'a sovereign, independent, democratic State', the head of the State being a President of Eire elected by a direct vote of the people and to hold office for seven years. But this constitution provides that as regards external relations, the Irish Government 'may to such extent and subject to such conditions, if any, as may be determined by law, avail of or adopt any organ, instrument or method of procedure used or adopted for the like purpose by the members of any group or league of nations with which the State is or becomes associated for the purpose of international co-operation in matters of common concern'.[33] The law on the matter was to be found in the Executive Authority (External Relations) Act, 1936, and thus the 1937 constitution, while this 1936 Act remained in force, continued the doctrine of external association. But from the British point of view, the 1937 constitution was a revolution in law. The constitution declares itself to have been enacted by the people of Ireland, but the Irish legislature did not authorise the people to enact it. The Plebiscite (Draft Constitution) Act, No. 16 of 1937, arranged for a plebiscite, but was silent as to the effect an affirmative vote would have.[34] But the British and Dominion Governments in December, 1937, recognised the 1937 constitu-

[32] *The Statute of Westminster and Dominion Status* (3rd ed., 1947), p. 263.
[33] Art. 29 (4) ii.
[34] Wheare, *The Statute of Westminster and Dominion Status, supra,* p. 276.

tion by stating that they regarded that constitution 'as not effecting a fundamental alteration in the position of the Irish Free State'. This amounted to a tacit recognition of the revolution in law. The final step has now been taken. The legislature of Eire has passed the Republic of Ireland Act, which repeals the External Relations Act, and when it came into operation on April 18, 1949 it severed the link with the Crown, the last constitutional thread with the British Commonwealth.

In the opinion of Mr. J. A. Costello, the Prime Minister of Eire, the King was never the symbol of co-operation between the nations of the British Commonwealth,[35] but this view would not have been shared by Kevin O'Higgins, who was assassinated by unknown murderers on July 10, 1927, and who, at the date of his death, held the Ministries of Justice and External Affairs, and was also the Deputy Prime Minister of the Irish Free State. Kevin O'Higgins had a plan for a 'dual monarchy' on the Austro-Hungarian model, 'the King to come to Dublin and be crowned there as King of All Ireland by both Catholic and Protestant Primates . . . Great Britain and Ireland would be two independent kingdoms, united by allegiance to the same King and by a Defence Agreement. He had come to realise that the Crown could be a link rather than an "irritant"'.[36] That dreadful murder has had a profound effect on the history of Eire.

South Africa, too, had dealt with the question of eliminating the King personally in any external affairs of South Africa, and as she did it in 1934 she is entitled to be regarded as the first Dominion to pass legislation under which the King can be personally eliminated from dealing with the external affairs of a territory owing allegiance to him. The Royal Executive Functions and Seals Act enables the South African Government to decide what functions, whether external or internal, shall be performed by the King personally on the advice of the South African Cabinet, and what by the Governor-General. But the difference between Eire and South Africa is that the former denies allegiance to the Crown, whereas the latter does not. South Africa is still a partner State in the British Commonwealth.

[35] *Times* newspaper, October 2, 1948.
[36] Mr. Frank MacDermot's review of *Kevin O'Higgins*, by Terence de Vere White (1949), *Sunday Times* newspaper, January 16, 1949.

The Report of the Conference on the Operation of Dominion Legislation and Merchant Shipping Legislation, 1929, pointed out that the status of the Dominions in international relations, the fact that the King, on the advice of his several Governments, assumes obligations and acquires rights by treaty on behalf of individual members of the Commonwealth, and the position of the members of the Commonwealth in the League of Nations, and in relation to the Permanent Court of International Justice, do not merely involve the recognition of these communities as distinct juristic entities, but also compel recognition of a particular status of membership of those communities for legal and political purposes.[37] The Report also pointed out that the members of the Commonwealth are united by a common allegiance to the Crown. This allegiance is the basis of the common status possessed by all subjects of His Majesty,[38] and the question of a common status has become of the utmost importance in view of the accession of Asiatic countries to full membership of the Commonwealth. Its importance lies in 'the desirability of facilitating freedom of intercourse and the mutual granting of privileges among the different parts of the Commonwealth'.[39] '. . . this common status is in no way inconsistent with the recognition within and without the Commonwealth of the distinct nationality possessed by the nationals of the individual States of the British Commonwealth'.[40] These views were approved and confirmed by the Imperial Conference, 1930, which Conference also came to the conclusion that it is for each member of the Commonwealth to define for itself its own nationals, but that, so far as possible, those nationals should be persons possessing the common status, though it was recognised that local conditions or other special circumstances may from time to time necessitate divergences from this general principle. That Conference further recorded that the possession of the common status in virtue of the law for the time being in force in any part of the Commonwealth should carry with it the recognition of that status by the law of every other part of the Commonwealth. Until 1946 there was a common code consisting of legislation of the United Kingdom and Dominion

[37] Cmd. 3479 (1930), para. 74.
[38] *Op. cit.*, para. 75.
[39] *Op. cit.*, para. 77.
[40] *Op. cit.*, para. 78.

Parliaments which gave all British subjects a common status, but in 1946 Canada, who had found it desirable to introduce legislation to lay down the conditions for the acquisition and loss of Canadian citizenship, passed the Canadian Citizenship Act, which Act continued to recognise the common status of British subjects but departed from the common code system.[41] At the suggestion of the United Kingdom Government a conference of experts[42] met in London in February, 1947, to consider whether the citizenship principles introduced by the Canadian Act should be extended by agreement to the other Commonwealth countries. The deliberations of this Conference and subsequent correspondence with the Governments of the territories concerned led to the passing of the British Nationality Act, 1948,[43] which came into force on January 1, 1949. The key section, so far as the British Commonwealth is concerned, is Section 1, which confers British nationality by virtue of citizenship. Every person who under the Act is a citizen of the United Kingdom and Colonies, or who under any enactment for the time being in force in Canada, Australia, New Zealand, South Africa, Newfoundland,[44] India, Pakistan, Southern Rhodesia or Ceylon is a citizen of that country, has, by virtue of that citizenship, the status of a British subject, and that person may be known either as a British subject or as a Commonwealth citizen. So far as the peoples of the United Kingdom and Colonies are concerned, the principle of complete equality of status has been preserved by the creation of a single citizenship, governed by identical principles and applicable without distinction to the peoples of the United Kingdom and Colonies alike. The United Kingdom and the Colonies are, for citizenship purposes, one community. The position now is that each of the countries referred to will, by its own legislation, determine who are its citizens, will declare those citizens to be British subjects, and

41 British Nationality Bill, 1948, Summary of Main Provisions, Cmd. 7326 (1948), para. 4.

42 Representing the United Kingdom, Canada, Australia, New Zealand, South Africa, Eire, Newfoundland, Southern Rhodesia, Burma and Ceylon. No representative of India attended, but arrangements were made to keep the Government of India informed of the course of the proceedings.

43 11 & 12 Geo. 6, c. 56.

44 If Newfoundland becomes the tenth Province of Canada, her citizens will, of course, continue to be British subjects by virtue of Canadian legislation.

will recognise as British subjects the citizens of the other countries. This method has the advantage 'of giving a clear recognition to the separate identity of particular countries of the Commonwealth, of clarifying the position with regard to diplomatic protection and of enabling a Government when making treaties with other countries to define with precision who are the persons belonging to its country and on whose behalf it is negotiating'.[45]

The Government of Eire made it plain that they could not agree that Eire citizens should be comprised amongst British subjects. The case of Eire has been dealt with specially by the 1948 Act. Any citizens of Eire who immediately before January 1, 1949, were also British subjects have the right to give notice at any time claiming to remain British subjects,[46] otherwise Eire citizens are not British subjects. But a citizen of Eire ordinarily resident in the United Kingdom, or who is in the Crown service under the United Kingdom Government, has the same right as a citizen of the Dominions to apply for his registration as a citizen of the United Kingdom and Colonies.[47] Further, until the law is altered, citizens of Eire who are not British subjects will continue to be treated in the same way as British subjects,[48] and the term 'alien' expressly excludes citizens of Eire.[49] Reciprocity comes into the picture, as the Government of Eire have made two Orders under the Irish Nationality and Citizenship Act, 1935, which give to citizens of the United Kingdom and the Colonies, and New Zealand, rights in Eire similar to those enjoyed by the citizens of Eire resident in the United Kingdom.[50]

Australia and New Zealand have already enacted legislation similar to the United Kingdom British Nationality Act, 1948. Thus, the Australian Nationality and Citizenship Act, 1948, came into operation on January 26, 1949,[51] and under it a British subject not Australian-born is able to acquire Australian

45 Cmd. 7326 (1948), para. 7.
46 They will have to satisfy the grounds set out in section 2 (1).
47 Section 6.
48 Section 3 (2). Mr. Attlee stated in the House of Commons on November 25, 1948, that the United Kingdom Government will not regard the Republic of Ireland Act as placing Eire in the category of foreign countries and that the position of Eire citizens in the United Kingdom will still be governed by the British Nationality Act, 1948.
49 Section 32 (1).
50 *Times* newspaper, January 3, 1949.
51 Australia Day.

citizenship by the simple act of registration, but suffers no disability if he does not do so. An Irish citizen in Australia can become an Australian citizen by declaring his wish to that effect. Passports issued to Australian citizens after January 26, 1949, will describe the holders as Australian citizens and also as British subjects.[52] Seven applicants for naturalisation (a Czech, a Dane, a Spaniard, a Greek, a Frenchman, a Yugoslav and a Norwegian) under this new Australian Nationality and Citizenship Act on February 3, 1949, took the oath of allegiance to the King and received certificates of Australian citizenship and British nationality at the first public ceremony of the kind, over which Mr. Justice Simpson, of the Supreme Court of the Australian capital territory, presided.[53]

The Commonwealth legislation on citizenship is of considerable importance from the point of view of migration. In parts of the Commonwealth there are enormous areas of land which are sparsely populated, and cannot be properly developed because of lack of population. Other parts of the Commonwealth, however, are already over-populated, and the population in those parts is still increasing. An obvious solution would be migration from the over-populated to the under-populated parts, and in theory such a solution is practicable. But the actual position, unfortunately, is entirely different. The British Commonwealth, like other parts of the world, has problems of colour prejudice and racial minorities. Canada, Australia and South Africa come readily to mind. The time has arrived for old ways of thought to be discarded, and for partner States in the British Commonwealth to adopt a new attitude to the Commonwealth. Until 1947 the British Commonwealth consisted of self-governing nations of the white races, but now the partnership includes self-governing nations of coloured races. Moreover, the day is not far off when other colonial possessions, the inhabitants of which are coloured, will rightly be admitted to the partnership. Race or colour should not, so far as British subjects are concerned, be, in themselves, barriers to complete freedom for British subjects to settle in other parts of the Commonwealth, and in their attainment of equal political status with other communities in the territories where they settle. If

[52] *Times* newspaper, January 26, 1949.
[53] *Times* newspaper, February 4, 1949.

there is discrimination, how can there be equality of status? But it is not only the white races who practise discrimination. Religious differences have an important effect on status in some coloured races. Again, some coloured races consider themselves superior to other coloured races. It is a most complicated problem, but one that must be satisfactorily solved if the future of the British Commonwealth is to be really bright. There must be 'give and take' in the right spirit on the part of each and every partner in the British Commonwealth. The present state of affairs is an actual disharmony in the respective interests of the partners in the Commonwealth, and it constitutes a real danger to Commonwealth unity. Ideas of racial superiority have, as all of us know only too well, helped greatly to bring the world to the brink of disaster. Such ideas embrace the philosophy that certain races or peoples are entitled to dominate or exploit other races or peoples. The British Commonwealth should set an example to the world by insisting on actual equality of status, i.e., by taking steps to ensure that Commonwealth citizenship carries with it the right to vote, the right to earn a living, and the right to own property. Real progress could be made if all those in positions of influence in the Commonwealth were imbued with the same spirit as that of the Governors of London House, the centre of collegiate life in London for British, Dominion and Colonial men students. Established by the Dominion Students' Hall Trust, it was originally debarred from admitting coloured men to residence, but its Governors decided to seek powers to bring the foundation into line with modern conceptions of the British Commonwealth. The Court gave the Governors the authority they wanted,[54] and London House will admit, on terms of complete equality, coloured students for the first time in the academic year beginning September, 1949.[55]

Professor Mansergh suggests that Eire's relationship with the British Commonwealth indicates 'a Commonwealth of the future, in which there are both member States and associate States, the distinction between them being one, not of status, but of history, tradition and cultural background'.[56] External association, he says, does not rest 'upon a sense of underlying

[54] *Re Dominion Students' Hall Trust*, [1947] L.J.R. 371.
[55] *Times* newspaper, January 14, 1949.
[56] *The Implications of Eire's Relationship with the British Commonwealth of Nations, supra*, p. 18.

unity in history, development and tradition, symbolised by allegiance to a common Crown, but upon a sense of partnership between two peoples with different histories and different loyalties, but sharing common interests, common aims in world politics, and, above all, a common sense of values'.[57] 'Dominion status', in his view, 'depends for its working upon a whole set of ideas, a whole range of common associations, containing nice implications only to be readily understood by people whose background and whose training have been very similar. But how can the peoples of the East attach precisely the right weight to all these unwritten conventions and think instinctively along the lines on which we have been accustomed to think in Commonwealth affairs?'[58] These are attractive views and worthy of the utmost consideration and respect. To enable one to say whether one agrees with them or not, one must ask oneself if the modern concept of Dominion status is inadequate to meet the just demands of all the partners in the British Commonwealth. The answer to this question is the answer to the question contained in the title of this paper.

Dominion status means that each partner has the right to decide its own destiny. The United Kingdom herself has full power to exercise every function of national and international life, so must have each of her partners, otherwise there would not be equality of status. The neutrality of Eire in the second World War illustrates the point, as does her secession from the British Commonwealth. Freedom of association implies freedom to secede. '. . . the bonds uniting the nations of the Commonwealth are more enduring and more intangible than the bonds of material advantage, important as these are . . . it is because the individual nations share a fundamental moral purpose and appreciation of spiritual values that they continue to form a Commonwealth in which there exist special relationships'.[59] Surely Lord Balfour was right when he said that 'small differences of manners, customs, or languages may create a wholly illusory feeling of separation far greater and far more difficult to deal with than those produced by oceans and mountains'.[60]

[57] *The Implications of Eire's Relationship with the British Commonwealth of Nations, supra,* p. 12.
[58] *Op. cit.,* p. 16.
[59] R. Frost (ed.) *The British Commonwealth and World Society* and *Report of the Third Unofficial Conference on British Commonwealth Relations* (1947), p. 81.
[60] Lord Balfour on the Report of the Imperial Conference, 1926, *supra.*

Professor Mansergh's views were expressed some months before the 1948 Conference of Commonwealth Prime Ministers was held. The official statement issued after the final plenary meeting of that Conference recorded the fact that the representatives of the new Dominions brought to the deliberations of their colleagues the wisdom of their ancient civilisations vivified by the dynamism of the modern age. The present writer suggests it is obvious that meetings of East and West on an equal footing are bound to lead to changes in the unwritten conventions forming the basis of Dominion status. The West will have to understand not only the 'nice implications' resulting from their own ideas, but also from those of the East. The youngest Dominion—Ceylon—has already attached 'precisely the right weight to all these unwritten conventions' and thinks 'instinctively along the lines on which we have been accustomed to think in Commonwealth affairs'. Her Prime Minister (Mr. Senanayake) speaking in Bombay on November 4, 1948, on his way home from the Conference of Commonwealth Prime Ministers, said 'Ceylon will remain in the Commonwealth of Nations as long as we feel our place is safe and our interests are not jeopardised'.[61]

The symbol of association of members of the British Commonwealth must be the King, not the Crown. As Dr. Evatt, when speaking at Perth on January 13, 1949, said, the central feature of the British Commonwealth means a most intimate relationship with the King, who stands for something reaching far beyond politics. He is the head of the society of the British Commonwealth, of the whole body of his subjects in all their human relations, and in loyal allegiance to his person they are able to feel at one with one another without compromising their political separateness. The Crown is an abstraction, standing for the executive aspect of political authority, and it has come to mean something different in each one of the partner States of the British Commonwealth, which are politically independent of one another.[62] The King need only be the link for Commonwealth matters. For all other affairs and concerns a partner State can have any other kind of Head of State it wishes, and that other Head could be the representative of the King in the partner State concerned. Eire has preferred the Harp to the Crown, and has, legally, become a foreign State. If any partner

[61] *Times* newspaper, November 5, 1948.
[62] Leading article in the *Times* newspaper, January 14, 1949.

State should feel that she cannot accept the King as the symbol of Commonwealth membership, it is better for that State to renounce its membership. Membership is a privilege, not a punishment.

The 1926 definition of the position and mutual relation of the members of the British Commonwealth is still a sound definition. The new Dominions may feel it is too flexible in that it allows, *e.g.*, neutrality and secession, but 'The cornerstone of the Commonwealth is the will, the goodwill, of those who compose it. Without that will the Empire [Commonwealth] must collapse. If, therefore, the Empire [Commonwealth] is to be maintained, if it is to flourish, and fulfil that great task which we all hope it will achieve in the history of the world, we must see that the will to live in the Empire [Commonwealth] as a Commonwealth of free nations, will, in future, as it is today, be present active with every one of its constituent elements'.[63] A negative answer, in the view of the present writer, must be given to the question posed in the title of this paper. The expression 'Dominion Status' itself may be old-fashioned, and perhaps should be replaced by some other expression—say 'Commonwealth status'—but the basis for membership of the Commonwealth must surely be that of the 1926 definition. That basis satisfies all aspects of the Commonwealth—national, Commonwealth, and international—and meets the natural desires of the individual partner States for individuality and co-operation. 'Dominion status' is not an inferior or subordinate status, and the members of the British Commonwealth would do well to take the status as it now in fact exists, and to forget its history. The British Commonwealth must look to the future, and not keep glancing back at the past. In this way it will be true to itself, and will cease to be one of the three major forces in the world—for it will then become the greatest force for achieving that peace and progress for which the world so desperately yearns.

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Since the above paper was written two important events have occurred. The first is that, by virtue of legislation of the Parliaments of the United Kingdom and Dominion of Canada, Newfoundland on March 31, 1949, became the tenth Province of

[63] Parliamentary Papers, 1927, Cmd. 2769, pp. 24–25.

Canada, and up to the time of this note[64] the appeal to the Judicial Committee of the Privy Council referred to in the above paper has not been heard. The second is that a conference of the Prime Ministers of the British Commonwealth is now[64] actually taking place to discuss the possibility of India still remaining a member of the British Commonwealth in the event of her becoming a Republic. It will be interesting to see if the statesmen of the British Commonwealth are able to devise a formula which would permit of that being done. Further, it is understood that the British Government propose to introduce legislation to solve the legal problems which have arisen consequent on Eire's secession from the British Commonwealth. At the date of the passing[65] of the British Nationality Act, 1948, it was not thought that Eire intended to secede completely from the British Commonwealth, as she in fact did on April 18, 1949. None of the matters and things mentioned in this note has altered the views of the present writer expressed in the above paper.

[64] *i.e.*, April 25, 1949.
[65] July 30, 1948.

14

PRIVATE LAW ASPECTS OF WESTERN UNION

F. H. Lawson

When I was asked to give this paper on 'Current Legal Problems', I felt that I was called upon to make some contribution which could most appropriately be made by a professed comparative lawyer; and what could be more 'current' than 'Private Law Aspects of Western Union'? At one time, indeed, I wondered whether I could say anything profitable when Western Union was still in doubt, and I was prepared to submit that even a hypothetical union was worth considering from this point of view. Now, however, it looks as though some form of union will come into existence, and I can speak with some sense of actuality. Doubtless the form and scope of Western Union are still uncertain; but they are of much less interest to the private than to the public lawyer. Although a private lawyer cannot be entirely indifferent to the form of union, since clearly a legislative union is a more efficient instrument than one with merely consultative organs, yet even an imperfect union could do much to bring greater order into the private law of Western Europe. Similarly with scope: one must assume at the very least that the United Kingdom, France and the Benelux countries would be member states and that one of the objects of union would be to improve the facilities for intercourse among their respective citizens. The crucial problems then appear at once, and only variety and complication are added if Western Union is extended to include Italy, the whole or part of Scandinavia and, a good deal more doubtfully, as it seems for the present, Western Germany.

I ought also to say at once that I shall give to the term 'Private Law' a rather extended meaning. I shall include, not only civil and commercial jurisdiction and procedure, but also criminal law and procedure—in other words, pretty well everything that, in a liberal state, is habitually kept apart from

party politics, and treated as something to be got as quickly as possible on to a plane of settled doctrine. Geographically, too, I shall throw my net as wide as possible, to include everything north of the Pyrenees and west of the Iron Curtain.

The systems of private law in force in that great area are, of course, very many; the essential variety is certainly greater than in any comparable space. For it is the original home of both the civil law and the common law. Let us note then first this great initial division. But the civil law systems are by no means uniform; their kinship is much more apparent to a common lawyer than to the persons subject to them. At one time a most noticeable feature was the wide extension of the French Civil Code in its original form or in imitations. From the beginning it applied uniformly to France and Belgium, Luxemburg and Germany west of the Rhine, and it was soon extended to the Netherlands and great parts of Italy. The Netherlands made little substantial change when they introduced their own Civil Code in 1838, and may still be regarded as belonging to the French sphere, as may Belgium and Luxemburg, though varying legislative and jurisprudential developments have drawn all these laws somewhat apart. The achievement of Italian unity made perhaps even less break in this uniformity of law, for the Italian Code of 1865 is for the most part a palpable translation of the French Code. But a great change came when the German Civil Code became operative in 1900, for not only was the French Code forced back beyond the German frontier, but a new model was set up in competition with it, and one which had a great influence, first on Swiss and then on Italian law. The Italian Code of 1942 is in many ways a middle term between French and German law.

How do these codes differ? Principally in age. In the part which will interest us most, namely the law of obligations, the French Code remains virtually as it was in 1804, and none of the great nineteenth-century problems is reflected in it. For them one must go to the textbooks (*la doctrine*), which have long been engaged in bringing order into the enormous mass of case-law (*la jurisprudence*), such a striking feature of modern French law. In other words, the Code has been overlaid by interpretation, and no one dare refer to it without giving effect to received doctrine and case-law. The German Civil Code is by comparison

modern, and the Italian Code very modern, and so they are by no means so overlaid. But in any case they are much more coherent and complete than the French Code, and there is much truth in the contention of their admirers that a problem will always find an answer within the four corners of the Code. In theory the French Code, too, is complete, in the sense that no common law was left standing beside it in 1804, but some of the most important doctrines or institutions, such as unjust enrichment, have been created by the Courts, as it were out of nothing, or, like the *stipulation pour autrui,* by a perverted interpretation of the Code. Much of the Code is now a series of pegs on which to hang rather surprising constructions, much as Jhering used Roman law to give him the doctrine of *culpa in contrahendo.* In the end French civil law bears a curious likeness to English common law. In comparison German law is much more essentially statutory, though the Code itself has, by emphasising requirements of good faith and the like, made it possible for the Courts and jurists to develop certain supereminent equities and so to loosen the somewhat tight structure of the Code. But it is notoriously difficult to characterise a code, and in the end I come to what I started from, differences of age.

Nevertheless, it is necessary to emphasise that, in spite of the great doctrinal similarities of the civil law systems, and the comparative ease with which a lawyer brought up under one of them can understand another, they differ quite considerably in detail, and often on points of importance. To take a very striking example, one would expect the law relating to the sale of goods to be substantially the same everywhere. This it assuredly is not. There are very substantial differences as regards risk, place of performance or payment, the standard of quality sufficient to satisfy the contract and so on; and in these matters of detail one civil law system may differ more from another civil law system than from English law. Thus in its treatment of the problem of risk German, not English, law is the odd man out. Again, if one considers so important a question as the boundaries between negligence and strict liability, one cannot predict the answer by reference to the civil law or common law character of the law in question. In pure commercial law the original derivation of a legal system may be of very little importance, for German company law, to take a salient example,

has been very much influenced by English law, French law not at all.

The only strictly common law countries in Western Europe are England and Wales, Northern Ireland and Eire. The Real Property law of Ireland is more old-fashioned than that of England, and there are some other divergent points of detail, especially in Eire, but substantially Ireland is a country of English law. Scots law is not very easy to place. Scotland is traditionally a civil law country, for it underwent a partial reception of Roman law, and down to the middle of the eighteenth century Scottish law students habitually spent some time in the Dutch universities. Even now there is a strong tendency, by no means confined to Scottish Nationalists, to emphasise independence of English law and to make much of the civilian tradition; and indeed much of Scots law, especially the law of land and succession, is obviously not English. More significant is the failure to develop anything akin to the English division between common law and equity. Yet the two laws are now, especially for purposes of commerce, close together, and the relative importance of doctrine and precedent in the making of law is very much the same. Certainly one can find very little Roman law in the modern law of Scotland: the un-English parts of Scots law are hardly ever of Roman origin, but are rather indigenous. If I had to place the modern law of Scotland in either the civil or the common law camp, I should have to place it in the latter; and I doubt whether it is any longer in a position to mediate between English and continental law.

That role might, however, be played by the Scandinavian systems, which form a circle of their own. They rest in theory on codifications of custom made late in the seventeenth or early in the eighteenth century; but the codes, since they were casuistical, *i.e.*, gave solutions only to a number of specimen cases, were full of gaps, and, partly by obsolescence and partly by express abrogation, have hardly survived to the present day. Thus the Scandinavian laws are in form not unlike English law: they have statute books which deal for the most part with crime and public law, but include partial codes like our Bills of Exchange and Sale of Goods Acts. The main body, the fundamental portion of these laws, is derived from doctrine and the

decisions of the Courts; and there never was a reception of Roman law. Were it not that precedents are not strictly followed and the writings of jurists are very influential, one might feel that one was in a common law system, or rather in a semi-common law system like Scots law that knows no distinction between law and equity. This would not be an entirely true impression, for the jurists who built up the law in the nineteenth century were very greatly influenced by the great German jurists, so that the categories of Scandinavian law are for the most part perfectly intelligible to civilians, whereas our categories usually are not. Yet one feels that Scandinavian lawyers experience little difficulty in reading books on English law, and their attitude to law is very like our own.

This immense variety of private law systems raises two main questions for those concerned with Western Union, namely, (1) to what extent, if at all, does it constitute an obstacle to Western Union; (2) to what extent, if at all, should we expect it to be reduced if Western Union is achieved.

(1) A brief consideration of several well-known instances should convince us that variety in private law is far from being an obstacle to federal, or even integral, union.[1] The most obvious case is, of course, Great Britain itself; for it was made an essential article of the Union between England and Scotland that Scotland should be left undisturbed in possession of her own private law.[2] Although that has not guaranteed Scots law from alteration by a Parliament in which the Scottish members are in a marked minority, Scots law remains separate.

The next most interesting case is Canada, where French and English law live side by side in a federal union; and indeed for a generation before confederation they were partners in a colony of United Canada closely akin in type to Great Britain. Does the subsequent loosening of the union of 1840 and its replacement by confederation in 1867 imply that complete union was incompatible with so marked a diversity of private law? I doubt this very much. Other differences, of language, religion, and national temperament, played a much greater part in the change; and indeed the United Parliament of Canada, far from

[1] If Union is to proceed hardly further than the consultative stage, as seems probable for the moment, it is of very slight importance.

[2] 'But that no alterations be made in Laws which concern private right except for evident Utility of the Subjects within Scotland' (Art. XVIII).

trying to produce an artificial unity of private law, had, by codifying the civil law of Lower Canada, protected it against absorption and surreptitious change.

The third case that I shall mention, less striking at first sight, though on closer inspection presenting many surprising points of interest, is the United States. We now think of the United States as a country of common law, and thereby possessing a fundamental unity of private law. But American legislatures have always been very active, and their activity has produced great diversity, doubtless mainly in public law, but also in private law[3]; and, as we have seen in considering the variations in the civil law systems of Western Europe, variations in detail can be of greater practical importance than a general similarity of spirit.[4] Moreover, Louisiana has a civil code based on the French Civil Code, and her subjection to a civil law system was not considered at all incompatible with her entry into the Union as a State. Indeed, so unpopular was English law in some parts of the Union, and so popular, in theory, was French law, that the alien character of Louisiana law may even have been a slight commendation. Nor must I fail to mention the prevalence, in eight Western and South-western States, for the most part formerly subject to Mexico, of a system of community property between husband and wife which is not at all easy to fit into the common law of property and domestic relations. So far as I know, mere peculiarities of private law have never impeded the admission of a new State. For slavery began to create difficulties only when it came to have an obvious bearing on public law and the balance of sectional power, and the Mormon polygamy of Utah presented a moral rather than a legal barrier.

In each of the cases I have mentioned the diversity of private law either amounts to much less than appears or is palliated by peculiar circumstances. Little inconvenience attaches to diversity in the law of land or of the family: both the French and German Civil Codes perpetuate local variations in the law of matrimonial régimes, not indeed avowedly as local variations—the French Code forbids reference to a *ci-devant* custom—but as arrangements which the parties can adopt

[3] *E.g.*, the rules against perpetuities differ widely from State to State.

[4] Thus it may matter very much to litigants whether the law of a State does or does not contain the rule in *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330.

summarily by name.[5] Now most of the operative law of Scotland in 1707 dealt with land or the family; and such commercial law as there was—and this alone interested Englishmen—was part of a universal law merchant, in force throughout Great Britain. Moreover, at much the same time as Lord Mansfield incorporated the law merchant in the common law of England, a similar process took place in Scotland. Even the general law of contract was imperfectly developed until the end of the eighteenth century, so that the way was open for a wholesale reception of English law, largely, it is said, through the writings of the last great institutional writer, George Joseph Bell. Thus it is open to any one to say that the private law differences between England and Scotland were in any case too insignificant to present a serious obstacle to political unity.

In Canada, on the other hand, the differences of private law are anything but insignificant. The French-Canadian private law of Quebec is in no danger of being submerged by English-Canadian law. It is much easier for a French-Canadian lawyer to keep up with the developments in French than in English law. Moreover, by 1867, and even by 1840, French-Canadian law was complete and mature in a sense that Scots law was anything but complete and mature by 1707. There was no great gap to be filled by a wholesale reception of English law. Yet in Canada also there are palliatives which should make us hesitate before completely discounting difficulties which might be raised by variations in private law. Although Quebec is a minority in Canada, it contains in Montreal what was once incontestably and is still probably the commercial capital of all Canada; and the higher direction of commerce, transportation and finance is predominantly in the hands of English-speaking Montrealers, who are in the closest touch with Toronto, New York and London, and are familiar with common law ways of doing business. Thus although Quebec commercial law is only assimilated in part to the common law—much less than, for instance, in South Africa—and Dominion legislation plays on the

[5] Art. 1390. *Les époux ne peuvent plus stipuler d'une manière générale que leur association sera réglée par l'une des coutumes, lois on statuts locaux qui régissaient ci-devant les diverses parties du territoire français, et qui sont abrogés par le présent Code.*

Art. 1391. *Ils peuvent cependant déclarer, d'une manière générale, qu'ils entendent se marier ou sous le régime de la communauté, ou sous le régime dotal.*

whole a subordinate role in it, Montreal business practice is closely linked with that of common law centres.

Finally, criminal law and procedure are uniform throughout the Dominion, and so is the procedure in *habeas corpus*; and the whole of this is of English origin. It is indeed codified, and as such, doubtless, more palatable to the French-Canadians. Perhaps the existence of a common criminal procedure has done something to accustom them to English ways of administering law. Certainly the presence of French-speaking judges on the Supreme Court of Canada and the frequency of cases in the Courts of Montreal turning on documents drawn up in a common law atmosphere must have had some such effect. But it would seem that both the Supreme Court and the Judicial Committee of the Privy Council have done their best—if they have not always been successful—to preserve the civil law of Quebec from contamination by common law elements.

The history of Louisiana is, of course, far less significant, for Louisiana is only one among forty-eight States, and not among the most important. Louisiana law is, we are told, in process of absorption by Anglo-American law, largely because few Louisiana lawyers readily consult French law-books. Two factors still tend to keep the two laws apart: the existence of a civil code, and the teaching of civil law alongside common law in the universities of the State. Still, the experience of Great Britain, Canada and the United States seems to show that diversity of private law need not prove an obstacle to political unity.

(2) To what extent, if at all, should we expect this diversity to be reduced if Western Union is achieved? The answer to this question will depend largely, but not entirely, on whether there is to be a common legislature and, if there is, what powers are to be conferred on it. These factors will hardly be decisive, for we have seen that the United Kingdom Parliament has not attempted to assimilate Scots law to English law. They have grown closer together through a uniform approach to new problems, but it has never been a commendation of a proposed reform to the lawyers of either country to say that it is already in force in the other. Thus the existence of a common legislature with power to alter private law does not necessarily mean that diversity will be abolished; though the parts of the law

where diversity is greatest may well become less important and eventually drop off, whilst the new rules will be uniform. Whether even so much assimilation would occur between laws of such different antecedents as French and English law may be doubted: the history of the Parliament of United Canada (1840–67) was too short to give an answer. But to any one who might fear the abolition of the specifically English quality of our private law by a Parliament in which we were in a minority, I would urge that the other countries are very unlikely to 'gang up' against us on such an issue, and that private law questions have so few votes in them that the politicians would hardly take enough interest in them to force through a change.

Nor is the existence of a common legislature with powers over private law necessary to the process of assimilation. As I have shown elsewhere,[6] there are many ways in which total or partial uniformity can be achieved; by reception of a foreign law, such as the reception of German law by China and Japan and of Swiss law by Turkey; by transmission from a colonial office to dependent countries; by the joint drafting work of such bodies as the American or Canadian Uniform Laws Commissioners. Nor need such commissions be appointed by the member states of a federation; one of the most interesting examples of fruitful joint activity is to be found in the uniform acts of the Scandinavian countries on such topics as Sale of Goods and Contract.

Nevertheless, all such devices are a second best. Even a legislature like the United States Congress, which has power to legislate in matters concerning interstate commerce, is not so useful an instrument as a legislature with full powers over private law. It cannot compare in efficiency with the legislatures which produced the German and Swiss Civil Codes and the Swiss Code of Obligations. The consultative assembly, which, if the press reports are correct, is all that Western Union will produce, may be still less efficient; but it is none the less a matter of interest and perhaps some urgency to decide whether it should have power to discuss, and even, through its committees and officers, to prepare drafts of legislation concerning private law and, if so, of what parts of it.

Now it is a marked, and somewhat surprising, peculiarity of

[6] *Journal of Comparative Legislation,* November 1944, pp. 18–20.

federations that they have commonly left control over private law to their member states. But the practice is by no means uniform and, where it has prevailed, may perhaps be the result of historical accident. The first important federation of modern times, the United Netherlands, was so loose as not to have anything meriting the name of a common legislature; for the States-General was merely a body of delegates from the Provinces, who were bound by their instructions and had to refer back to their Provincial Diets any unexpected proposals. The present American Constitution developed out of another confederation hardly more unified, and the powers given to Congress were an essential minimum. Since the movement towards a 'more perfect union' started from difficulties impeding interstate commerce, it was natural that power to regulate such commerce should be conferred on Congress; but, with few exceptions, this was the only power over private law so conferred. Canada and Australia followed America in this regard, the former, no doubt, the more readily because legislation affecting French-Canadian private law was regarded as peculiarly the province of the Quebec Legislature, the latter perhaps because the matter was not thought important enough to call for special provision. However, in Canada, as I have already said, criminal law and procedure were made a subject of Dominion legislation.

In Imperial Germany the Reichstag started with distinctly wider powers, covering, besides criminal law, commercial law, the law of negotiable instruments, and the procedure of the Courts, that part also of civil law which deals with obligations. But the pressure for a German Civil Code was so strong that as early as 1873 the powers of the Reichstag were extended to cover the whole civil law. Very much the same development took place in Switzerland, though much less rapidly. Thus the first edition of the Federal Code of Obligations dates from 1881, but when it was desired to enact a Civil Code for the entire Confederation, the constitution had to be amended for that purpose. The Federal Legislature can, since 1898, legislate on all matters of private law and criminal law, though it cannot regulate the constitution or procedure of the Courts, such matters being regarded as so closely bound up with the local life of the people as to be properly left to the cantons. Experience, therefore, seems to show that a middle term can be found between

giving complete power over private law to a common legislature and giving no power at all, namely to give control over commercial law and its civil law basis in the law of obligations, with or without power over criminal law. In the two countries where that has happened, complete power over civil law has followed pretty rapidly; but for this there were doubtless special reasons, German nationalism and the excessive smallness of the Swiss cantons. The member-States of Western Union need not fear that a surrender of power over commercial law and the law of obligations would necessarily imply a surrender of power over the law of land or the family. But for my part I should prefer to make all rights over movable property, other than those connected with family law, go with the law of obligations; though the drafting of an article that would be clear to civilians and common lawyers alike might present difficulties.

Commercial law certainly presents the most popular field of unification. It is there that the American Uniform Laws Commissioners have been most successful; and the law relating to Bills of Exchange is now virtually contained in three enactments, the English Bills of Exchange Act, the American Uniform Negotiable Instruments Act, which is closely related to it, and the Geneva Act, which governs civil law countries. There is certainly much to be said for giving a common legislature power over commercial law. But here again it is easy to be over-optimistic. Some parts of commercial law are *jus cogens,* that is to say, they lay down rules which call for strict obedience and cannot be excluded by act of parties. Such are, for instance, much of company law and, in effect, the law of negotiable instruments. But much is *jus dispositivum,* laying down, for instance, only the *naturalia,* the implied terms, of particular contracts, which can be excluded or varied by the parties, whether by express terms or by proof of trade usage or custom. Now it is in this part of commercial law that unification has made the greatest strides; and it is open to the cynic to say that unification is only feasible where it can be immediately undone at will. In fact the last half-century has seen the elaboration of great standard contracts, for bulk sales, transportation and the like, which have largely side-tracked the implied terms contained in the codes; and it has become obvious that the real law of international trade is contained in these standard contracts, some

of them imposed by monopolistic combinations, rather than in legislation, and that the most profitable forms of State activity, so far as private trade is concerned, would be the outlawing of unfair practices and the provision of facilities for the uniform interpretation of contracts; which suggests that a Federal Supreme Court and something comparable to the American Federal Trade Commission may be more urgent requirements than a Common Commercial Code.

Still, there is much that could profitably be done to unify and improve the law relating to the acquisition of goods by a bona fide purchaser—a part of the law which is *jus cogens*—and the experience of the United States seems to show that a uniform law relating to such parts of company law as the issue of prospectuses and the protection of investors is a most valuable expedient: in default of such uniformity, Gresham's law asserts itself and the State with the laxest company laws gets the business. It may be that socialisation has gone too far for such questions to be of crucial importance. Yet our present Government thought fit to give parliamentary time to the latest of our revisions of company law.

Another topic that might well be recommended to the attention of a common legislature is Private International Law. However eagerly one may hope that a unification of commercial law may make it unnecessary to choose between the laws of the member-states, there will still be problems of private international law where the laws of countries outside the Union are concerned; and for the period during which the member-states will wish to preserve their distinctive family laws—I can see no end to that—we shall continue to have problems of private international law within the Union. Now there is a consensus among private international lawyers that private international law, far from becoming more international, is steadily splitting up into divergent national systems, and that in some countries the jurists, instead of making a virtue of necessity, emphasise the need for a strictly national view of foreign law lest the distinctive policy of the State should be thwarted. Even before these developments, which have led to the denunciation of the Hague Conventions for the Unification of Private International Law by various signatory powers, divergent views of the law governing personal status led to the invention of such awkward devices

as the doctrine of *renvoi,* the acceptance and non-acceptance of which by various States made confusion worse confounded. There is now no guarantee whatever that a case will be decided the same way, whatever the country whose courts are invoked; though that is what ought to be hoped for from an efficient system of private international law.

It seems to me that a strong reaction against these tendencies is one of the most immediate needs in private law; and a Union which might shrink from giving its assembly power even over commercial law, might well undertake the task of bringing order into the private international law of the area. One of the main difficulties[7] is that any change that brings us nearer to the Continent—and we could not expect the Continent always to come over to us—tends to draw us farther apart from other common law countries. I leave it to the private international lawyers to say whether America has not already moved so far away from England as hardly to belong to the same camp—certainly the American interpretation of domicile is not the same as ours, and there are considerable differences in the private international law of contract and of torts—but it may be that we should have to work for a separate private international law to operate merely within the Union. We might at least ensure that a woman should have the same married or unmarried status throughout the Union, and that if married, there should be no doubt which of the national laws should regulate her economic position *vis-à-vis* her husband; that the rules governing the assumption of jurisdiction by one country's courts should not differ from those which they apply when deciding whether a judgment of a court of another member-country is one which it had jurisdiction to give; and so on. The position would be in some respects analogous to that which subsisted in Poland between the wars and before the unification of her civil law: there was one set of rules governing conflicts among the five territorial laws inside Poland, and another and separate private international law governing conflicts between one of these laws and a non-Polish law.[8] But whereas Poland had only

[7] It applies to all attempts at unification, as Professor Gutteridge has shown, *Comparative Law,* pp. 163–164.

[8] Cf. '*A General Outline of some Principles of Conflict of Laws in Poland*', by R. K. Kuratowski, in *Studies in Polish and Comparative Law,* pp. 110 *et seq.*

one such system dealing with the outside world, each member-State of the Western Union would, for the time being at least, retain its own private international law for this purpose. The effect would be comparable to that obtained by the present conventional variations of private international law which operate between pairs of States. One can imagine, for instance, that France might be willing to adopt domicile as a better test of personal status within the Union than nationality—she is already moving in that direction—and that, within those limits at least, both England and Scotland might be willing to adopt a more practical definition of domicile. Again, the member-States might feel themselves so closely allied in moral, social and political standards and interests that they would consent not to reject the application of each other's laws because of some supposed *ordre public*. This solution would surely leave it open to the English Courts, whilst achieving a *modus vivendi* with the other member-States, to keep in line with the other common law countries in matters which concerned them; and if the *modus vivendi* succeeded, it would probably spread to countries outside the Union.

Would it not also be possible to bring the courts of the various member-States into closer relation to each other in such matters as bankruptcy and the administration of the estates of deceased persons? These are only a few suggestions. Doubtless a private international lawyer could make many others. The enforcement of foreign judgments has already been greatly assisted by conventions with France and Belgium. To extend the arrangements to the Netherlands and Luxemburg would perhaps hardly need the intervention of a Union assembly.

I hope I have shown that there is much in what may, in an extended sense, be called the private international law field which deserves the attention of such an assembly, and much that it could discuss and recommend without interfering with other, wider, schemes of unification or reform.

In some ways criminal law presents even better opportunities for legislation than private international law, for there is no real need to keep in step with other common law countries. Every American State has now codified its criminal law, by no means on uniform lines; Canada has a uniform criminal code, and whereas three of the Australian States retain the common law,

three have codes. Can it be said that there is anything sacrosanct in the English definitions of crimes? Would there be a popular outcry if we rationalised the law of theft and misappropriation of goods? Need we keep the English law on these subjects pure, whatever that means? Or could we not co-operate in framing a common criminal code for the whole Western Union? It is understood that the codification of English criminal law may not be far off. Why should it be done in isolation?

It is a circumstance worthy of curious consideration that, although the police forces in different countries co-operate intimately in the detection and apprehension of criminals, and although criminologists and prison reformers usually know very well what is being done in countries other than their own, very little comparative work has been done on criminal law itself. How many know that in form the criminal law of Scotland is quite different from that of England, though, as the late Professor Gloag once wrote, 'there is no case of serious importance in which an act is criminal in the one country and not in the other'? I suspect, though my comparative researches have not yet led me into this field, that much the same could be said of the other laws of north-western Europe. Probably we differ most in matters where sex is concerned; but perhaps no one would suffer if a little light were let into that dark corner of criminal law.

However, I suspect that even more is to be gained from lessening the frontier barriers between the police forces of the various countries, and in removing the necessity for extradition proceedings. Here again I am on unfamiliar ground. I know that even in a unitary country like England there can be difficulties between one local police force and another, but the position is altogether different from that which exists in the United States, where one State has to apply to the Governor of another State for the rendition of a person accused of an offence against its laws. It is also obvious that there is no extradition between England and Scotland and Northern Ireland[9]; which suggests, incidentally, that one can do without extradition even if the two countries concerned have not identical criminal laws. It may be the case—I do not know—that it is dispensed with

[9] The practice is for the English police to get a warrant for arrest backed by Scottish justices if the offender has fled to Scotland, and *vice versa*.

between France and Belgium and Luxemburg, or between Belgium and the Netherlands. Whatever the present position, surely it would be advantageous to have it discussed by a common assembly.

Although much might also be gained from a discussion of the variations in criminal procedure—and each country has enough reproaches to make against the others to make tact less necessary than we sometimes imagine—I cannot suppose that unification would result. The differences are too deeply embedded in the public mind to be entirely eradicated. One point is, however, of prime importance. We could not allow a British subject to be handed over to the police of a foreign country which had nothing comparable to *habeas corpus,* or the Act of the Scottish Parliament that takes its place north of the Border. Could not the continental police forces be asked what value they place on the power to hold a suspect in prison whilst investigating his case? Our police seem to get on well enough without it except in times of great political crisis, and even then it is called in aid sparingly. We recollect the case of Landru in France, who was kept in prison for seven years until the last of his many crimes was discovered; but could he not have been dealt with rapidly and to the same effect on the first charge? How often do the French or Belgian or Dutch police keep a person in custody for any length of time before trial? These are questions that could surely be discussed openly with benefit to all. Indeed the whole subject of crime and penal reform seems eminently fitted for discussion in a common assembly, whether legislative or only consultative in character, and the more so if political parties have not yet had time to form.

Let me now go back to a topic on which I hinted a short time ago. Is there a case for a Court of Appeal common to the whole Union? And if so, what should be its jurisdiction? I cannot imagine that, in the present climate of public opinion, many persons desire a court with general jurisdiction to review the decisions of the House of Lords, the French *Cour de Cassation* or the corresponding courts of other countries; and it is beyond my scope to consider whether anything of the kind should be set up to deal with constitutional issues. Moreover, the experience of the Judicial Committee seems to show that there are great objections to setting up a court of criminal appeal

too remote from the actual trial of a charge; nor is it likely that a supreme Union Court would be called upon to say that a substantial denial of justice had been left unremedied by the courts of a member-State. I have, however, already hinted that over large stretches of commercial law the crucial point is interpretation; and I must now emphasise the well-known fact that English and continental canons of interpretation differ very widely, and that not merely in theory, but so as to give different results in practice. Not only are continental lawyers and judges much less literal in their interpretation of words, but they let in extrinsic evidence to an extent that would be inconceivable here. Where an English lawyer looks for 'the sense of the contract', his continental brethren ask 'what did the parties intend'? Every lawyer knows how the answers to those two questions may differ.

I have suggested that a common commercial code might be of little use without a common supreme commercial court; and in spite of all the difficulties I still think we should aim at the latter. We should most probably find that a court with a majority of civilians on it—as would almost certainly be the case—would adopt the continental canons of construction, and that they would not follow strictly their own previous decisions. It may be doubted, however, whether English businessmen would be so seriously disturbed by this as English lawyers, for there have long been complaints that English commercial law has become too inflexible. The work of Lord Mansfield in incorporating mercantile custom into the common law was not all pure gain. At the same time I think it should be possible when submitting a case to arbitration to agree to exclude the jurisdiction of the courts entirely and even to empower the arbitrator to arrive at a practical settlement without strict regard to law, to act, as the French say, as an '*amiable compositeur*'. The function of the Supreme Court would be to preserve some consistency in the interpretation of the commercial code.

Likewise I feel sure that there is little to be gained by enacting a uniform code of private international law unless there is a central Court to keep its interpretation uniform and to fill in the gaps as they appear. But it would be difficult to justify the establishment of a Supreme Court with so narrow a competence; and there might well be a not unnatural outcry if it were

proposed to superimpose yet another appeal upon the House of Lords or the *Cour de Cassation,* the more especially if it were at the expense of the parties to a suit. What I suggest is something much simpler, as requiring no additional personnel and no extra cost to the parties, though it would call for a high degree of co-operativeness among the judges concerned.

Could not provision be made for consultation between the highest courts of appeal in the various member-States whenever one of them found itself in a position where it felt bound to differ from one of the other courts? The technique of consultation would be a matter for discussion. I take the suggestion from the practice of the Court of Session in Scotland, according to which, if one Division of the Inner House feels impelled to depart from a decision of the other Division, it can resolve the antinomy by appointing the case to be heard before a court of seven judges, *i.e.,* the four judges of the Division seised of the case and three judges from the other Division; and very exceptional cases can be submitted to all the thirteen judges of the Court of Session. But in truth the example of the French *Cour de Cassation* seems even more in point; for, according to a recent reform, when a case brought before one of the Civil Chambers raises a question of principle, or when its solution might cause a departure from existing case-law, it can be taken before the plenary assembly of all the Civil Chambers. The necessary quorum is not large, and since the First President and the Presidents of the Chambers must be present, there may be a tendency for this official element to predominate in the decisions. For our purpose we might well be content if cases were submitted to a permanent committee representing all the highest courts of the Union. Since the purpose of consultation would be to preserve legal unity, the costs of reference should fall upon the public finances of the Union, or, should it not yet have a common chest, rough justice would doubtless be done if each member-State lent its judges for the occasion at its own expense. Likewise I should prefer that there should be no appeal by a party to the committee, but a reference by the Court seised of the case; though, of course, the reference could, and doubtless would, be suggested by counsel for one or other of the parties.[10]

[10] The procedure of the old Court of Crown Cases Reserved might be followed.

Finally, the reference would cause less trouble if it took place before rather than after the highest court of the member-State disposed of the case.

I understand that one of the chief difficulties to be faced in establishing a Union assembly is that of finding subjects for discussion which, though vital enough to engage the interest of its members, will not lead to dangerous consequences. Only if the assembly can be given some hard work of a practical kind to do can it be prevented from degenerating into a mere sounding-board for propaganda. I hope I have shown, without in any way exhausting the field, that private law presents an ample sufficiency of topics, quite enough to engage the interest and energy of such an assembly during the time when it is finding its feet, and above all precisely the sort of questions that could be referred for discussion to committees. In such small groups the members could learn to know and trust each other by serious co-operative work undertaken and pursued without undue prejudices of a national kind. Moreover, such an assembly might take over much of the work of private law reform from the existing national assemblies which cannot, or will not, devote to it the necessary time and attention.

15

LAW IN THE BRITISH ZONE OF GERMANY

H. Krawinkel

In the series of papers on *Current Legal Problems* I have the privilege and the rare pleasure of speaking to you about '*Law in the British Zone of Germany*'. That this topic is a current one I need hardly tell you; at least it is so for us. But somehow or other you will have gathered in the course of the last number of years that it is problematic too. Of course the period under review is one of transition. But there is not much sense in trying to give you a picture of the present legal situation in Western Germany by telling you simply what has been done and what remains to be done after four years of occupation. Some of the problems have been current preoccupations for some decades; they linger on and clash with ideas of quite recent origin. There is, for instance, the vast problem of the re-education of a whole people, and there is the practical side to it of how to realise that aim by way of making laws. But you cannot get even a rough idea of what is going on in Western Germany without being reminded of some facts of history. First of all Germany had never been a national unit before 1870. All the glory of the Holy Roman Empire, or what romantic professors of history have made of it, is nothing but a sham, seen from the angle of the modern or late medieval state. I will not enlarge on it, but last year's German secular celebrations again plainly showed that the accent even now does not lie on the European phenomenon of 1848, but on the purely national and sentimental misconceptions of a glorious past. The state of the law was as chaotic as the 'split-up' sovereignties of the member states, and very late in the eighteenth century there emerged some codes of more than regional bearing. The French Civil Code of 1804 was introduced in the Rhineland and in the Grand Duchy of Baden. The Kingdom of Saxony got its own Civil Code in 1863, and there was some law-making under the German Confederation, laws which were promulgated

separately by the member states, for instance, the commercial code which is still in force today and some similar smaller codes of inter-state commercial value. Beyond that the states retained their own and in themselves manifold legal systems.

Today Germany is a country of codified laws, and from 1870 onwards both substantive and procedural law-making progressively came under the legislative competence of the Reich. Under the constitution of Bismarck's making there still were some important subjects reserved for legislation by member states. But the trend towards legal unification, often against the spirit of constitutional guarantees, got its main impulses from the great judicature laws of the late seventies, from the setting-up of a Supreme Court at Leipzig in 1879 and stronger still from the German Civil Code of 1896, which has remained in force since 1900. The drafting of that code had taken some twenty years. A then famous poet hailed it as the incarnation of justice clad in native garb. This sounds a bit Benthamite. Nevertheless, the commentators had to get busy on it and after half a century they have not done with it yet. Furthermore, increasing 'nationalism' made possible the reduction of reserved matters under the Weimar constitution and Hitler easily dispensed with the last remaining strongholds of reserved legislative competence. Some few Prussian, Bavarian, Saxon and other laws outlived even the Nazi regime; but they did so only either because they were deemed politically neutral, as the mining laws, or for the significant reason that they had not reached the stage of codification and in their essence as judge-made case law they defied easy legislative alterations. This chiefly concerns the police laws of the states.

But on the whole the vast majority of legal matters and the basis of Germany's legal system is statute law of very recent origin, necessarily without any regard for the 'split-up' traditions of the past. This enormous and rather successful work of codifying and re-creating nearly the whole legal order of a large country had one unexpected corollary: it changed the whole mentality of the people towards the law. The Germans slowly and rather unconsciously withdrew from a general concept of law as justice incarnate, underlying the most intricate rules, and began to hold that law is primarily a technique for realising the aims of their legitimate government. May I here insert a few

remarks to show how the use of corresponding words in different languages lays bare a deep gulf of difference in essentials. The current description of the foremost duty of an English judge is the administration of justice. This simple definition, of course, has a twofold meaning, the ritual and celebration of administering justice as a just and righteous good, and the accomplishment of a highly formal task of settling a dispute according to the law as it stands. Never has there been such a dual conception in the German administration of codified laws. The German word *Justizpflege* means the formal deciding of a given case. *Justiz* itself means the organisation of the tribunals, and the other half of justice, *Gerechtigkeit,* does not occur at all. That is left to be treated by professors of jurisprudence. Of course, there are some sections in the Civil Code which are meant to preserve basic ethical values, general clauses, but pleading them has ever appeared suspicious of a dearth of better arguments. And on the whole the most conspicuous result of that vast undertaking of codifying the law is that it has created an attitude towards the law which overestimates the formal side of statute law and fosters a disposition towards the acceptance of sudden and intrinsically arbitrary changes of the law. This most unfortunate condition of German law and public opinion was only slowly being realised, when Hitler saw his chance under this legalistic conception and trapped the lawyers in the snares of their own making. Hitler's party slogans on law had been sweeping, but when he actually came to power he did not make a frontal attack on the existing legal order. He chose a more insidious method of ousting one by one the existing courts. He set up his special courts and subjected them to new rules of procedure. This piecemeal change of the organisation of the courts had its corollary in a similar piecemeal alteration of the substantive law. The main body of the Civil Code alone remained unchanged, though it had been the main target of his attacks before his advent. A new marriage and divorce law replaced the relevant sections of the Code. Leases of houses and land got a new protection as well as farmer debtors and mortgagors. Practically all landed property of peasants was granted a special régime. But otherwise the Nazis were well satisfied with what had been done under the Weimar legislation. In criminal procedure the jury had been abolished in favour of lay assessors

in 1926. From 1930 on came the time of emergency ordinances dealing with the economic crisis, and in 1932 there had been set up the first special court to deal with certain political crimes. But Hitler's greatest inroads upon the existing order and upon the certainty of the law were made by the application of analogy in criminal law and by a much widened application of the general clauses in civil matters. Furthermore, in 1935 the criminal courts were given the power to punish if the sound instinct of the people demanded it and if punishment would be in accordance with the underlying principles of some provision of the Criminal Code. The courts soon discovered that these precepts did not work at all. In 1936 there came before two courts in Northern and Southern Germany two cases concerning two quite similar abortion facts committed by two women of 'non-aryan' race. With the Northern tribunal the sound instinct of the people told them to pass a lenient sentence. On the merits of the case there was one Jew less. And with the Southern their instinct told them to treat the woman harshly for not obeying the laws of the host country. As a result it became almost impossible to foretell how an act was punishable. And the same applies to civil procedure, where the decisions based on a wide interpretation of general clauses became more frequent; furthermore, the public prosecutor became entitled to lodge an appeal in civil cases, when he thought some point of public interest had arisen.

During the war, procedure was severely restrictive of existing rights. From 1943 on there sat only professional judges in all courts, and appeals were abolished altogether for the parties, being reserved exclusively to the Chief Public Prosecutor. Only one of the special courts, the notorious People's Court, continued to sit in senates consisting of two professional judges and three lay assessors selected from reliable Party members. But the Nazis themselves never denied that this was a purely political court. When the war ended, the whole hierarchy of the courts had been destroyed and even the outward functioning of the courts had almost ceased. In no other field of their organising and planning activities had the regime failed more notoriously.

The Allies came with a fixed legal programme made up beforehand. They stuck their ordinances on posters which we read full of awe. But slowly it dawned on us that they were not thoroughly acquainted with the state of disintegration at which

we had arrived. There followed ordinances which declared all Nazi legislation void and ordered the law as it stood before 1933 to be resuscitated. When the courts reopened nobody knew what the law was. The question 'What is a Nazi law?' seems to be a simple one, and of course the flagrant cases were simple and generally did not become actionable at all. Well, to make a complicated story short, there slowly grew up a whole body of new codes and rules. During most of the past four years, first of American and then of British occupation of Western Germany, there have been busy—simultaneously or successively—four main organs of law-making: the Control Commission, the American and British Military Government, individual military commanders deciding given cases which bind the courts and are apt to act as precedents, and finally the triple legislation of *Land*, Zone and Bi-zone. There are about five heads under which the chief topics of all this law-making may be classified: legislation in the interest of the military occupation, purgatory laws against the revival of Nazism and militarism, emergency laws concerning economic and social problems, reconstruction laws to foster economic recovery and laws for furthering the political re-education of the people. Needless to explain at length that part of these laws overlap in scope.

I think I may swiftly pass over the first head concerning the security of the occupation army. There are ordinances relating to military courts, control and watch of the wireless, public meetings, political parties, military uniforms, carrying of arms, prohibition of fortification construction, of military literature, and so on. The only really relevant question, which has not yet been settled, concerns the fact that there is no action in any court for the redress of wrongs committed by employees of German nationality of the Military Government against German civilians. This chiefly concerns crime, tort and alimony cases. To take only the question of reckless driving—and there are thousands of German car drivers in the services of the forces—of course they may undergo, and in most cases certainly will undergo, an investigation and some sanction or other by the occupational authorities; but there is no action yet for the German civilian, and in some grave cases the *Länder* have thought right to grant State help. The question is expected to be settled by the coming Occupation Statute. Of course, this is only a very special

grievance, and on the whole it may be said that there are no serious objections to the general character of this class of laws and ordinances.

The so-called purging legislation has two sides to it, a purely purging and eliminating one and an element of atonement and rehabilitation. To the former class belong the repeal of typically Nazi laws[1]; the repeal of Nazi criminal law,[2] prohibition of analogy, abolition of excessively harsh penalties, changes in the Nazi marriage law which abolish racial ideologies and keep some modern humane views on marriage and divorce, thus reviving the relevant former sections of the Civil Code, control of research in natural science topics, dismantling of works, etc.

The legislation of a purging and atoning kind concerns the blocking and control of property of prominent Nazis with the aim of inquiring into the origin of such assets and, in given cases, of reserving them for restitution and rehabilitation of persecuted people. In the British zone there is no legislation yet with regard to the indemnification of this whole class of subjects or former citizens.

The next class of emergency legislation chiefly aims at alleviating the economic troubles of the country after the war: raising of taxation, measures against the housing problems, prohibitions of change of residence, registration of able-bodied people for labour control, rationing of food and gas and electricity. In the field of *Land* and zone legislation there has slowly grown up legislation for the protection of rights of absent people, particularly of prisoners of war, who have not yet returned. This chiefly concerns limitation of statute, guardianship of property and respite of payments.

The reconstruction laws govern nearly the whole field of activity of modern states. First of all there is a whole body of legislation for the dismemberment of Prussia,[3] the formation of new member states and the revival of the federal character of the nation. There is a similar Law for decartellisation of industrial mammoth concerns. Then there is the replacement of the Reich organisation by central zone bodies, which partly are about to be merged in a bi-zone régime, for instance the

[1] Control Council Law No. 1
[2] Control Council Law No. 11.
[3] Control Council Law No. 46.

creation of a central justice department,[4] a zonal audit office, public debt office, zonal authorities for finance, customs, railways and last but not least the establishment of a Supreme Court for the British Zone at Cologne.[5] Both the Constitution, the Basic Law and the Occupation Statute are still *sub judice*.

In the field of Labour Law there are three big Control Council laws, *viz.*, for Labour Courts,[6] mainly a revival of the Law of 1926, the law concerning advisory labour members on boards of industrial companies[7] and the law concerning the settlement and arbitration of labour disputes.[8] These are mainly only frames for future special legislation by the *Länder* concerned and lay down the principles of free contract and free compromise of the workman and/or his union on one side and the industrialists on the other.

In the field of land law there is a similar frame law to inaugurate land reform on the basis of legislation by the different *Länder*.[9] Substitution of the notorious Hereditary Peasants Holdings Act by a new Act of similar scope avoiding the harshness of the former one and its basic ideology. But the principle remains that it is desirable that peasants' holdings should devolve without splitting up.[10]

The whole legislation for currency reform must also be considered as an eminently reconstructing one.[11] You can hardly imagine the difference it has made to the whole physical and moral attitude of the people. Of course, there were hardships, which could have been avoided, but generally speaking the results have far surpassed expectations, and as a legal instance, which I think is rather telling, I need only mention the fact that criminality in the British zone abruptly went down by about thirty per cent and has stayed at the new level ever since.

The biggest inroad on the whole legal order prevailing before 1933 in the British zone has been the introduction of a new legal order for the *communes*, the German Municipal Code, which

4 Military Government Ordinance No. 41.
5 Military Government Ordinances Nos. 49, 58, 62, 63, 71, 98.
6 Control Council Law No. 21.
7 Control Council Law No. 22.
8 Control Council Law No. 35.
9 Military Government Ordinance No. 103.
10 Military Government Ordinance No. 84.
11 Military Government Ordinances Nos. 61–64.

has now been in force for nearly two years.[12] I think I must read you part of the preamble, but I must warn you that it is a proclamation in the continental style. 'It is the proclaimed policy of Military Government to obliterate Nazism, to eliminate from German law and administration the policies and doctrines of the National Socialist Party, to institute orderly government and to give to the German people the right and responsibility of conducting their own affairs. This policy can only be carried out gradually, and the establishment of fully democratic institutions based upon the elective principle must proceed by successive stages. At each stage it will be necessary to revise the law in order to prepare the way for a further advance in the next stage. The first stage involves the elimination of the *Führerprinzip* at all levels of local administration and the distribution, among groups of persons representing the various interests of the people, of the governmental functions which have hitherto been concentrated in a single individual. The *Deutsche Gemeindeordnung* has accordingly been revised by the substitution therein of collective responsibility for the *Führerprinzip,* and for the time being (that is to say, until the second stage of revision is reached) it will have effect as hereby revised and not otherwise'.

This magnificent preamble introduces a law of more than a hundred sections, partly of a highly complicated nature, but well considered and formulated. After two years of its working, in order to give a fair verdict, first of all I must remind you that this Code is supposed to be only the first stage of an evolutionary process. But the first impression and in a way also the leading argument against the whole Code has been and is that it bears the stamp 'Made in England' all over it. There is another consideration that this means a further unification and standardisation of the formerly manifold municipal codes. That surely is a political aspect. One of the reasons why this new Code has not so far worked properly—and I think that could have been foreseen—is the spirit of party politics which formerly pervaded, and now pervades again, local government in Germany to a degree unknown in England. Local issues are not settled on the merits of a given case but according to the rules of a bartering

[12] Military Government Ordinance No. 21.

technique between the parties, and the members of local councils only play the game along the lines settled by party headquarters. May I add here—though it does not give any comfort to us—that this is and ever has been the custom in France. This practice touches fundamentals; it blurs outright the true spirit of English local government.

But there are other aspects to the matter. Becoming an *Oberbuergermeister,* a lord mayor, of a large town has always been considered a professional career of high distinction for a man who later on may become a Minister of State or even get a nomination for the presidential election. He always used to be a trained lawyer and an expert in higher administration and in the intricacies of continental administrative law. Now, under the new Code, he is supposed either to have a one year's turn of office and be absolutely dependent on the outcome of party bartering, or otherwise he is asked to go through the humiliating degradation of becoming a town clerk. In this respect the British authorities plainly saw that the title of 'clerk' would never do for such august officials, and the new title of *Stadtdirektor,* or in large towns *Oberstadtdirektor,* was supplied. Nevertheless, some of the best qualified former mayors or lord mayors were not willing to serve any longer on the basis of this legislation. They just emigrated and were gladly offered the positions they wanted by towns situated in the American zone.

This legislation in the municipal field has not been successful at all, but in fairness you will remember the statement in the preamble I read to you that this is only the first stage, and I do not entertain any doubts that by further legislation this present Code may be modified according to given exigencies, without falling back either into the ideological errors of the past or into the 'split-up' state of the law in former times.

There have been suggestions coming from the military authorities to reform the law of procedure. This particularly concerns the suggested introduction of the famous English notion of contempt of court. It was a reaction against certain happenings accompanying proceedings in a Schleswig Court two years ago, scenes unheard of in this country. German advocates and judges were asked for their opinions; the judges rather liked the idea, but the advocates positively did not, remembering some very nasty instances of contempt of court which they had

experienced at Nuremberg. After all, the suggestion had its inherent difficulties. This very famous provision of English law is, I need not tell you, judge-made law which has never been codified. The first task would have been for our new law-makers to try the experiment of codification on us. Fortunately they never tried, perhaps because it was thought that as punishment for contempt of court is a matter entirely within the discretion of the judges, contempt of court is not a matter suitable for codification. And, on the whole, it can be said that continental law and procedure are functioning smoothly, and that there are only affronts in court, or articles in the press, which seem to interfere with the due course of justice when something is fundamentally wrong with the substantive law rather than with the law of procedure. I shall refer to that presently, but I venture to suggest that these outbreaks of public opinion, either out of a natural instinct for justice or instigated by interested groups for party ends, are not of such grave consequence for the administration of justice in a country where the law is entirely codified.

In the field of criminal law there remains unchanged the principal ideas of the inquisitorial system of procedure as opposed to your accusatorial way. The criminal is open to attack by both the state-attorney and the judge: there is no shielding an indicted man in the English manner. The time honoured and capital duty of the state-attorney is to get his prey. He starts by giving a horrid picture of the past life of the man in the dock. With you this is considered a grave miscarriage of justice: because instinctively you relate the position of the accused somehow to fundamental rights of man under your unwritten constitution. With us it is simply a French heritage of procedure, but, of course, this is no excuse at all. But there is no one calling in the wilderness.

Furthermore, it should be mentioned that there is quite a chaotic situation in the treatment of juvenile prisoners: the prisons are overcrowded and there is no suggestion of separating first-offenders from the rest, though this very essential rule is plainly stated in the law.

In the field of administrative law the Prussian system of enumerative clauses of action has been given up in favour of the so-called general clause. Law now runs again on the four different tracks of civil procedure, and criminal, administrative

and revenue process. There is a certain movement to study fundamentals. Of course, there is no question yet of remodelling the Civil Code, but in the field of procedure there are developing slowly tendencies to discuss the possibility of re-uniting the different tracks of jurisdiction. There used to be a settled conviction that the expert ought to be the judge, too, of such highly technical matters as administrative and tax cases. But the expert slowly steps down and there is a feeling that there are more essential functions of the court than grappling with facts alone. Those of you who are aware of existing difficulties in English administrative law will be rather surprised to hear that in the Germany of today, with its deservedly proud tradition of the Berlin Supreme Administrative Court with its some hundred volumes of reported decisions, there is a marked willingness to expect the civil court judges to be able to be seised of and decide matters of administrative law, to amalgamate both jurisdictions in the interest of protecting the individual by completely judicialising and, if I may use the term, *civilising* the administrative process. Perhaps you will consider it quaint to hear that the lawyers who propagate such reforms never hear a word of similar preoccupations of English lawyers, whose ideas partly run in the opposite direction.

There is in the field of administration one rather important point which only touches the fringe of the legal sphere, *viz.*, the decentralisation of the police force—the handing over of most police functions and responsibilities to the municipal authorities. Of course, the main implications of this reform are in the political and military field. But there is another connected matter which awaits legislation on a tri-zonal basis, and which is a problem of rather great anxiety to us. You will be well aware that quite an exodus has been going on for a year or so from Eastern Germany to both the British and American zones. In the British zone alone there are hundreds of thousands of these emigrants, for the most part living in insanitary dwellings, and it is estimated that about a thousand more are arriving daily. Only very few of them have any means of subsistence and still fewer get a new start in life. They are leading an aimless existence and constitute an element of political unrest. Simply sending them back would in most cases constitute a grave injustice and would be no solution at all. The matter is at

present under consideration by the Military Governors of the three western zones.

To sum up the whole situation in a few words, it may be said that Western Germany is slowly putting its legal house in order. The general apathy has been overcome and there is slowly growing up a desire for co-operation, and some hope for the future. Of course, for some time to come, perhaps for decades, there will be openly or subconsciously a latent conflict between the spirit of true democracy and the legalistic aspect of the body of the law as a whole. Many decades before Hitler's advent German lawyers had built up a famous theory of *Rechtsstaat*. Benedetto Croce, himself a thorough expert of German legal theory, quite candidly professed that he never understood the doctrine. Broadly speaking, it seems to aim at some substitute for your Rule of Law. The State in its executive functions is supposed to be under the supremacy of law. There are some other familiar ingredients in the doctrine, *e.g.*, independence of judges, equality before the law, and so on. Hitler respected even this doctrine in a formal way. But as is well known, the German legislature delegated its powers to Hitler, who assumed the legalised position of Supreme Law Lord and united in his person the functions of supreme legislator and supreme judge. From then on—under this dual formalism of the codified law as it stood at any given moment and the *Rechtsstaat* doctrine—the courts acted according to rules of the Executive, which sometimes made them decide a given case in accordance with rules specially made for it.

Altogether, the *Rechtsstaat* conception by itself appears to be an offspring of legalism in its exaggerated form. And this legalistic spirit really is at the root of the trouble. To combat it there are rather tentative and unco-ordinated suggestions to apply the fundamental tests of the law of nature in its medieval and Christian concept. As such they remain a party issue, and there is no sign yet of trying to solve the problem Englishwise by putting the test to reasonableness and similar secular conceptions of an equitable nature.

The Germans like to resort to a test which has been applied by their philosophers and which pervades secular jurisprudence —the test of objectivity. But the application of objective reasoning is sometimes withheld when other people want it applied.

There is ample opportunity for us to practise it in the fields of local government as well as in the affairs of the *Länder* and the whole nation and its relations to the world at large. There seems to be no sense of decency nor any value in keeping up the tactics of skilful grumbling and sharp pleading when you are expected to collaborate in Western Union.

16

MEMBERSHIP IN THE UNITED NATIONS

L. C. Green

THE PROBLEM OF UNIVERSALITY

In his *De Monarchia* Dante writes, 'Being is naturally antecedent to unity, and unity to goodness; that which has completest being has completest unity and completest goodness. And as far as anything is from completest being, just so far is it from unity and also from goodness'.[1]

Every organisation that has been created or dreamed of in connection with the maintenance of international peace has sought universality, largely because of the threat inherent in the existence of non-members. Whenever the League of Nations failed to take action, or took insufficient action, particularly in the cases of Manchuria and Ethiopia, it was alleged that the responsibility for failure rested on the non-membership of certain leading states. It is the purpose of this paper to examine how far the United Nations has been able to cope with the problem of the non-member. It is not intended to examine the clauses of the Charter of the United Nations which purport to deal with the war-mongering non-member, but rather to ascertain how far the United Nations has achieved, or is capable of achieving, the 'greatest being, unity and goodness' regarded by Dante as fundamental.

Before considering the practice of the United Nations, however, it is necessary to examine the various types of universality.

Universality may be approached from various points of view.[2] In the first place, the structure of the collective system as a whole may be examined. This structure may be either imperial or co-operative. The essence of imperial universality rests in the establishment of a single world empire based on coercion from above. Such a system envisages the absorption

[1] Book 1, Chap. 15, 1314 (translation by A. Henry), 1904, p. 54.
[2] A full analysis of the various types of universality is to be found in *The League of Nations and World Order* by G. Schwarzenberger, 1936.

of the whole world by one power, strong and ruthless enough to maintain its own position regardless of the strivings of subject peoples to free themselves. Perhaps the best example in history of a universal imperialism is the *Pax Romana* of the Roman Empire, when 'war was reduced to police action against uncivilised tribes on the borders of the empire, and was regarded as a revolution when resorted to by any community within'.[3]

Imperial universality precludes the independence and equality of states and is the negation of national self-determination. After the disappearance of the Christian Commonwealth of the Middle Ages and the failure of Napoleon, it might have been thought that no further attempt would be made to establish international peace through universal imperialism. Nazi Germany and Imperial Japan, however, attempted to revive the idea. It will be recalled that Japan professed to be pursuing a policy of 'Co-Prosperity', but the philosophy behind this policy is to be found in statements made by leading Japanese statesmen: 'In order to conquer the world, we must first conquer China. In order to conquer China, we must first conquer Manchuria and Mongolia. . . . Sooner or later we shall have to fight against Soviet Russia. . . . One day we shall have to fight against America.[4] (For) the spirit of the Japanese nation is, by its nature, a thing that must be propagated over the seven seas and extended over the five continents. Anything that may hinder its progress must be abolished, even by force'.[5]

From the fate of Napoleon, Hitler and Tojo, together with the experience of the resilience of occupied peoples, it may be assumed that universal imperialism is a thing of the past. The discovery of the atomic bomb, however, has introduced new possibilities, but not even this new weapon can guarantee international peace through universal imperialism. As Earl Russell has pointed out,[6] the easiest way to achieve world government 'is by the supremacy of one nation . . . because it requires

[3] *Ibid.*, p. 7.
[4] *Tanaka Memorial*, 1927; for text see *China Critic* (Shanghai), Vol. 4, No. 39, September 24, 1931. Japanese spokesmen denied the authenticity of this document during the discussions of the League of Nations on the Manchurian incident, *The Sino-Japanese Controversy and the League of Nations* by W. W. Willoughby, 1935, pp. 161–162.
[5] General Sadao Araki in *Kaikosha*, July 1932.
[6] 'The Outlook for Mankind' by Bertrand Russell, *The Listener*, Vol. 37, No. 946, March 13, 1947, p. 370 at p. 371.

no fresh thought, no moral restraint and no creative imagination. It may be brought about . . . by the ordinary operations of power politics and war. The strongest state among the victors in another world war would be in a position to impose its will upon the whole planet, and to forbid all armaments but its own. There would be no occasion for any voluntary surrender of sovereignty. . . . The supreme national state would retain its own unrestricted sovereignty and the others would have no alternative to absolute sovereignty. . . . Peace would be secure, since no degree of discontent would enable subject nations to rebel successfully. With modern weapons, a government that is ruthless and energetic can impose itself upon even the most recalcitrant population. . . . Such a solution will be felt by almost everybody to be profoundly unsatisfactory. . . . It is probably not to be achieved without another world war, and not even then unless the war ends fairly quickly in the victory of one side. If the war ends in a draw neither side will be able to establish world supremacy. If the war lasts too long both sides will be too exhausted to be capable of much effort when peace comes, and there will not be even among the victors the resources or the energy or the statesmanship required for the establishment of universal hegemony. . . . (Further), a system of control over a foreign nation would cause very widespread discontent and would have to be enforced by rigorous police suppression. . . . It is therefore very doubtful whether the next world war . . . will establish the unification of the world under the domination of one victorious power'.

In direct contradistinction to achieving universality by way of imperialism is the creation of an international peace system on the basis of co-operation. Under the influence of theories of natural law combined with an appreciation of the existence of sovereign states based on the doctrine *par in parem imperium non habet*, philosophers like Pierre Dubois,[7] Saint Pierre[8] or William Penn[9] based their schemes for a universal peace system on the willing consent of the participating states.

Organisations like the League of Nations and the United Nations which are the creations of treaties depend on co-opera-

[7] *De recuperatione terræ sanctæ*, 1305.
[8] *Projet de traité pour rendre la paix universelle*, 1713.
[9] *Essay towards the Present and Future Peace of an European Dyet, Parliament or Estates*, 1693.

tion, and the universality they seek is co-operative rather than imperial. The United Nations is, however, a hybrid of imperialism and co-operation. By its Charter, all its members have voluntarily undertaken the responsibilities of membership, and, as we shall see later, new members are admitted as a result of an application and are not absorbed contrary to their wishes. Furthermore, it is expressly declared in the constituent document that 'the Organisation is based on the principle of the sovereign equality of all its members'.[10] Nevertheless, the five permanent members of the Security Council enjoy a hegemony denied to all other members, who have undertaken 'to accept and carry out the decisions of the Security Council'.[11] Not only do the Big Five exercise the functions of an imperialist directorate, but each of them, by virtue of its right of veto,[12] is itself in a position of imperial hegemony. This situation, however, is different from earlier attempts at universal imperialism; for the elevated position of these powers has been granted to them by the consent of the other members of the Organisation.

So far, we have merely looked at the problem as it affects the structural character of the Organisation as a whole. It is necessary now to devote some attention to the constitutional structure of the individual members. From this point of view, universality may be either homogeneous or heterogeneous. With the intensification of the 'cold war' between East and West, and the increased popularity of Western Union there has been a tendency for people to say that those who do not possess a common approach and are not willing to co-operate should be excluded from any international organisation.[13] This concept is by no means new. As early as 1795, Kant[14] advocated a federation of free states, each of which should possess a republican constitution, by which he meant that the citizens should participate in the government of the state. Heterogeneous universality, on the other hand, ignores the constitutional machinery of the participating states and allows the whole world to join the organisation.

10 Charter of the United Nations, Article 2, paragraph 1.
11 *Ibid.*, Article 25.
12 *Ibid.*, Article 27, paragraph 3.
13 See the present writer's 'Little Assembly', 3 *Year Book of World Affairs* 1949, p. 169 at p. 182.
14 *Perpetual Peace* (translation by H. O'Brien), 1939.

Woodrow Wilson desired the League of Nations to be homogeneous and confined to democratic states. He believed that 'a steadfast concert for peace can never be maintained except by a partnership of democratic nations. No autocratic government could be expected to keep faith with (the League) or observe its covenants. . . . Only free peoples can hold their purpose and their honour steady to a common end and prefer the interests of mankind to narrow interests of their own'.[15] In the Covenant, however, political homogeneity disappeared. The sole attempt to obtain any common constitutional basis for membership is to be found in Article 1 which declared that 'any fully self-governing State, Dominion or Colony . . . may become a Member of the League'. Nowhere was any attempt made to define a self-governing dominion or colony, while India, which at that time could not have been described as self-governing, or as a dominion or colony, was included among the original members; and after the admission of Abyssinia to League membership in 1923 it became evident that in League practice 'self-governing' was now to be regarded as synonymous with 'independent' and 'sovereign'.[16]

During the San Francisco Conference various attempts were made to insert a provision into the Charter requiring democratic homogeneity among future members of the United Nations.[17] At no time, however, was any attempt made to require similar homogeneity among the original members of the United Nations, one of which was the Argentine.[18] The only control on heterogeneous universality is to be found in Article 4, paragraph 1. This requires that all future members shall be 'peace-loving', while the Conference approved a Mexican declaration to the effect that this paragraph 'cannot be applied to the states whose regimes have been established with the help of military forces belonging to the countries which have waged war against the United Nations, as long as those regimes are in power'.[19]

[15] War Message of April 2, 1917, cited in *The United States and the League of Nations* by D. F. Fleming, 1932, p. 18.
[16] Schwarzenberger, *op. cit.*, pp. 88–92.
[17] UN Docs. 1074, I/2/76, 1160, I/2/76 (1), *UNCIO*, Vol. 7, pp. 289, 308.
[18] For Fascist character of the Argentine see *Argentine Diary* by R. Josephs, 1945.
[19] UN Doc. 1210, P/20, *UNCIO*, Vol. 1, pp. 615–616, approved p. 620.

Perhaps the most valuable approach to the problem of universality is that which depends on the purpose and function of the organisation. The ultimate aim of many universalists is the achievement of absolute universality embracing all states, regardless of size, political complexion or co-operative spirit. Such an attitude is to be found among the partisans of the United Nations Draft Declaration and Bill of Human Rights.[20] Such width of comprehension necessitates the introduction of exception clauses so wide as to destroy any value that the document may possess.[21]

Since absolute universality is virtually impossible of achievement, and since even when achieved it results in the complete subordination of the purposes of the organisation to the selfish interests of the individual members, it is necessary to consider the problem of relative universality. This system limits membership to those communities whose non-participation would endanger or limit the object for which the organisation has been created. This concept of universality is to be found in the Security Council. Permanent seats on the Council are awarded to the Big Five, even though it be true that only two, or perhaps three, could effectively endanger the peace, while the desires of the 'middle powers'[22] were met by providing that 'due regard should be specially paid . . . to the contribution of members of the United Nations to the maintenance of international peace and security, . . . and also to equitable geographical distribution'.[23]

At San Francisco many delegates seemed to worship the principle of universality; so much so that we find statements to the effect that 'the principle of universality should be supported, even though it cannot be achieved at this time'.[24] Others went so far as to suggest that membership should be compulsory for

[20] Doc. E/600. The Draft Declaration has now become the Universal Declaration of Human Rights, Doc. I/3/1949.

[21] See, for example, Article 4, UN Draft Bill; Article 4, British Draft, 1947; and Article 17 of Appendix to *Report* by H. Lauterpacht to Brussels Conference of International Law Association, Brussels, 1948.

[22] 'Great Powers and Small States' by M. W. Graham in *Peace, Security and the United Nations,* edited by H. J. Morgenthau, 1946, p. 57 at pp. 78–79.

[23] Charter, Article 23 (1).

[24] UN Doc. 604, I/2/42, *UNCIO,* Vol. 7, p. 114. For other statements on universality see Docs. 202, I/2/9; 242, I/2/11; 1074, I/2/761, *ibid.,* pp. 18–19, 24–25, 288–289, 294.

all, without any provision for expulsion or withdrawal.[25] It was on account of this formal universality that Italy and Japan were able to remain members of the League of Nations, regardless of their breaches of the Covenant.[26] The Charter of the United Nations is based on it, for it only provides for expulsion in extremely rare cases, and then never if one of the Big Five is concerned.[27] Further, the Charter makes no provision for the withdrawal of a member, although at San Francisco the delegates embodied in the Records of the Conference an explanatory resolution permitting withdrawal in exceptional circumstances, particularly in the event of an amendment of the Charter.[28]

Of far more importance than formal universality is material universality. This means that membership is confined to all those states prepared to keep their pledges and uphold the purposes and principles of the organisation. Technically, it might be argued that this is true of the United Nations, for membership is open only to those states which are peace-loving and able and willing to carry out their obligations under the Charter. This restriction applies expressly only to future members and not to the original members of the Organisation. Original members are, however, bound to 'fulfil in good faith the obligations assumed by them in accordance with the present Charter',[29] while even with regard to new members the test is purely subjective. The proposals for Western Union seem to be based on the principle of material success rather than formal universality, and the Organisation for European Economic Co-operation shows it at work.[30]

MEMBERSHIP UNDER THE CHARTER

Despite constant references to the principle of universality, the San Francisco Conference made no reference to any aspect of the concept in the Charter: 'The main opinion of the Com-

[25] Opinion of the Department of Foreign Relations of Mexico, Doc. 2, G/7/c, Vol. 1, p. 55 at pp. 79–83.

[26] Formal and material universality are discussed by G. Schwarzenberger in *Power Politics*, 1941, pp. 198–199.

[27] Articles 6, 18 (2).

[28] Doc. 1210, P/20, Vol. 1, p. 612 at pp. 616–617, 620; and see *Charter of the United Nations* by L. M. Goodrich and E. Hambro, 1946, pp. 86–89.

[29] Article 2 (2).

[30] See the present writer's 'European Recovery: Constitutional and Legal Problems', 2 *World Affairs* (New Series) 1948, p. 373.

mittee[31] was that adherence to the principles of the Charter and complete acceptance of the obligations arising therefrom were essential conditions to participation by States in the Organisation. . . . There were some who declared themselves in favour of inserting in the Charter specific conditions which new members should be required to fulfil. . . . Others maintained that the Charter should not needlessly limit the Organisation in its decisions concerning requests for admission, and asserted that the Organisation itself would be in a better position to judge the character of candidates for admission. . . . It was clearly stated that the admission of a new member would be subject to study, but the Committee did not feel it should recommend the enumeration of elements which were to be taken into consideration'.[32]

In the first draft of the Charter prepared at Dumbarton Oaks it was provided that 'membership of the Organisation should be open to all peace-loving States',[33] a concept that was not defined. At San Francisco a distinction was drawn between original members, that is to say signatories of the Charter,[34] and new members to be admitted after the establishment of the United Nations. According to Article 4 of the Charter, 'membership is open to all other peace-loving states which accept the obligations contained in the Charter and, in the judgment of the Organisation, are able and willing to carry out these obligations'. The admission of such states, according to paragraph 2 of the Article, 'will be effected by a decision of the General Assembly upon the recommendation of the Security Council'. As was pointed out in the joint dissenting opinion of four of the judges of the International Court of Justice when considering the problem of membership, this Article provides not for automatic accession, but for admission by consent and act of the Organisation itself.[35]

Like the Dumbarton Oaks Proposals, the Charter makes no attempt to define the term 'peace-loving'. In fact, as we have

31 Committee I/2, that is to say Committee 2 of Commission I responsible for drafting the Articles on Membership, Amendment and Secretariat.

32 Report of the Rapporteur of Committee I/2 on Membership, Doc. 1160, I/2/76 (1), *UNCIO*, Vol. 7, p. 306 at p. 308.

33 Cmd. 6560 (1944), Chapter 3.

34 Charter, Article 3, and see Goodrich and Hambro, *op. cit.*, pp. 77–80.

35 *Admission of a State to the United Nations* (Charter, Article 4), Advisory Opinion: *I.C.J. Reports*, 1947–1948, p. 57 at p. 84.

seen,[36] the delegates were anxious to leave the matter to the unfettered judgment of the Organisation. It must not be forgotten, however, that the Conference concurred in the Mexican declaration precluding from membership states whose regimes had been established with the help of the enemies of the United Nations.[37] The country most seriously affected in this connection is Spain. At the Potsdam Conference, 1945, the participating governments felt bound 'to make it clear that they for their part would not favour any application for membership put forward by the present Spanish Government, which, having been founded with the support of the Axis Powers, does not, in view of its origins, its nature, its record and its close association with the aggressor states, possess the qualifications necessary to justify such membership'.[38]

At this same Conference, Great Britain, the Soviet Union and the United States announced that they 'will support applications for membership from those states which have remained neutral during the war and which fulfil the qualifications set out' in Article 4. They further declared that 'the conclusion of a Peace Treaty with a recognised and democratic Italian Government will make it possible for the Three Governments to fulfil their desire to support an application from Italy for membership of the United Nations. . . . (Similarly) the conclusion of Peace Treaties with recognised democratic Governments in (Bulgaria, Finland, Hungary and Rumania) will also enable the Three Governments to support applications from them for membership of the United Nations'.[39] This declaration finds confirmation in the Preambles of the respective Peace Treaties, where it is pointed out that the Peace Treaty will form the basis of friendly relations between the victors and the vanquished, 'thereby enabling the Allied and Associated Powers to support (for example) Italy's application to become a member of the United Nations'.[40]

In connection with the ex-enemy states it is necessary to point out that these declarations in no way impose any obligation

[36] Text to note 32 above.
[37] Text to note 19 above.
[38] Cmd. 7087 (1947), Chap. 9, p. 12; and see the present writer's 'Spanish Dilemma', 12 *World Affairs* 1946, p. 240.
[39] Cmd. 7087 (1947), p. 12.
[40] Treaties of Peace with Italy, Rumania, Bulgaria, Hungary and Finland, Cmd. 7022 (1947), pp. 7, 79, 99, 117, 138.

upon the Three Powers or the signatories of the Peace Treaties. The Potsdam Declaration merely declared that the conclusion of peace treaties would 'enable' or 'make it possible' for the Three Powers to support membership applications, while the Preambles to the Treaties say that their conclusion would establish friendly relations 'enabling' the Allied and Associated Powers to support applications. These statements amount to nothing more than permissive declarations, leaving it entirely to the discretion of each of the states concerned to decide whether it intends supporting an application or not. For the same reason it is impossible to allege that the Three Powers must act in unison or that equal treatment must be accorded to all the ex-enemy states. Such assertions would detract from the discretion that the various documents regard as belonging to the states concerned.

The only other point in connection with the ex-enemy countries that needs mentioning at the moment is that the Potsdam Declaration and the Peace Treaties seem to envisage political homogeneity, for the five defeated states had to instal democratic governments before treaties could be prepared and, as will be seen shortly, the undemocratic character of some of them has contributed to their non-admission.

THE FATE OF THE APPLICANTS

In the three years since the establishment of the United Nations, twenty-three states have applied to be admitted to membership.[41] Before discussing the fate of these various applications, it is necessary to consider shortly the procedure of admission.

As we have seen, admission is effected by the decision of the General Assembly on the recommendation of the Security Council. It was pointed out early in 1946, before the practice of the Organisation had manifested itself, that 'this means that any member which is a permanent member of the Security Council will be able by its sole opposition to prevent a state from becoming a member of the Organisation',[42] for a decision to recommend the admission of a member is not a matter of procedure and is therefore subject to the veto of the Big Five.[43]

41 Albania, Mongolia, Afghanistan, Transjordan, Ireland (Eire), Portugal, Iceland, Siam, Sweden, Hungary, Italy, Austria, Rumania, Bulgaria, Yemen, Pakistan, Finland, Burma, Ceylon, Israel, South and North Korea, and Nepal.

42 Goodrich and Hambro, *op. cit.*, p. 82.

43 Charter, Article 27 (3).

Furthermore, the rules of procedure adopted by the Security Council in connection with the admission of new members[44] make it clear that the Security Council possesses both the initiative and the ultimate word.

All applications must be submitted to the Council, which will refer them to the General Assembly accompanied by a recommendation for positive or negative action, as the case may be. There is no obligation upon the General Assembly to accept the positive recommendation, but it cannot overrule the opposition of the Council, 'for in the system adopted by the Charter, admission is effected by the decision of the General Assembly, which can only act upon a recommendation of the Security Council, and after both these organs are satisfied that the applicant state possesses the qualifications required by paragraph 1 of Article 4'.[45] The only way in which the General Assembly can express its disagreement with the recommendation of the Security Council is by referring it back for reconsideration.[46] If it considers that the Security Council has acted illegally and disregarded its obligations concerning membership, the General Assembly may[47] ask the International Court of Justice for an Advisory Opinion on the matter.[48]

For these reasons it is not intended to deal with the activities of the General Assembly in connection with the admission of new members.

Of the twenty-three, only eight applicants, Afghanistan,[49] Iceland,[50] Siam,[51] Sweden,[52] Yemen,[53] Pakistan,[54] Burma[55] and

[44] Doc. S/96/Rev. 3, Chap. 10, Rules 58–60.
[45] *I.C.J. Reports,* 1947–1948, p. 57, Joint Dissenting Opinion, p. 85.
[46] UN *Journal* No. 75: Supplement A-64, Add. 1, and *Resolutions of the Second Regular Session of the General Assembly,* 1948, pp. 13–14; *The Times,* November 28, 1948; *Round-Up of the First Part of the Third Regular Session of the General Assembly,* Press Release, PGA/100, pp. 14–19.
[47] Charter, Article 96 (1).
[48] *Resolutions of the Second Regular Session,* p. 13.
[49] *SCOR,* First Year, Second Series, Supplement No. 4; *SCOR,* First Year, Second Series, No. 5; UN *Journal,* No. 29, Supplement A-A/PV/47.
[50] *Ibid.*
[51] Supplement No. 4; *SCOR,* No. 5; *SCOR,* No. 25; Supplement A-64, Add. 1.
[52] *L.c.,* note 49.
[53] *SCOR,* Second Year, Special Supplement No. 3; Doc. S/PV. 186; *Resolutions,* Second Assembly, p. 7.
[54] Doc. S/PV. 186; *Resolutions,* Second Assembly, p. 7.
[55] *SCOR,* Third Year, No. 54; *SCOR,* Third Year, Supplement for April 1948; Doc. A/538.

Israel[55a] have been admitted to membership. Of these we need consider only Siam, Pakistan and Israel.[55a]

When Siam first applied for admission the application was opposed by France and the Soviet Union. The former pointed out that Siam had been an aggressor against Indo-China and since no agreement had yet been signed, a state of war still existed. The Soviet Union objected because of the absence of diplomatic relations between Siam and herself. Siam countered this opposition by pointing out that diplomatic representatives were actually proceeding to their posts when the Soviet Union was attacked by Germany. Because other states queried whether an applicant could be admitted while still at war with a member, Siam withdrew its application pending an agreement with France. After this had been drawn up Siam applied again, and on this occasion experienced no opposition.

The application from Pakistan met with no opposition in the Security Council, but during its discussion the Council provided one of its rare flashes of constructive statesmanship. India had asked that her representative should be permitted to speak in support of the application. Despite the absence of opposition to Pakistan's application the Council agreed to this, for, as the President pointed out, it believed 'that the invitation to the representative of India to sit at the Council table would have a good effect on India itself and on Pakistan in that the representative of India supported the Pakistan application and made a statement to that effect in the Security Council'.[56]

The Western powers were divided in their attitude to Israel's application[57] but, with the exception of the ex-enemy countries, in the case of only two applicants did they offer opposition, although in neither case did they exercise a veto. The applicants in question were Albania[58] and Mongolia,[59] who were the first two states to apply for admission to the United Nations.

Albania met with strong opposition from Greece, who was allowed to participate in the discussion although not a member of the Security Council. Greece drew attention to the fact that

[55a] Docs. S/1093, S/1110, S/PV. 383–386, S/1267, S/PV. 413–414.
[56] Doc. S/PV. 186.
[57] See below, pp. 273–274.
[58] *SCOR*, First Year, Supplement No. 4; SCOR, Nos. 4–5; *SCOR*, Second Year, Special Supplement No. 3; Doc. S/PV. 186.
[59] Supplement No. 4; *SCOR*, No. 5; S/PV. 186.

the applicant had declared war on her, had not entered into a peace treaty, and was responsible for provoking numerous incidents on the frontier. The United Kingdom referred to the frontier incidents and pointed out that Albania had fired on British ships in the Corfu Channel, thus raising doubts as to Albania's ability and willingness to carry out the obligations of the Charter. In this connection the United States complained that the new Albanian Government had rejected the treaties of its predecessor, both bilateral and multilateral. This opposition was in no way reduced when the Soviet Union argued that the problem of succession to treaties was a matter of internal jurisdiction. Perhaps the most amazing defence of Albania was that offered by Poland: 'the present attitude of Albania on the territorial dispute had been exaggerated since Albania's original application's declaration of willingness to undertake the Charter obligations carried automatic acceptance of the principle of peaceful settlement of territorial disputes'.[60] At a later date opposition was offered because of Albania's tardiness in complying with the recommendation of the Security Council to submit the Corfu Channel dispute to the International Court of Justice.[61] It was not until after this discussion had ended that the Assistant Secretary General pointed out that Albania had expressed its willingness to appear before the Court.[62] This made no difference to the vote, for opposition was also based on Albania's non-co-operation with the United Nations Sub-Committee on the Balkans.

The opposition to Mongolia's application was based largely on the lack of knowledge concerning that country. It was pointed out that only China and the Soviet Union recognised this State, while only the latter maintained diplomatic relations with it. Poland asserted that recognition was not essential to membership. The United States seems to agree with this assertion, for the American representative supported Transjordan's application for membership,[62a] even though the Government of the United States did not extend recognition to the Hashimite Kingdom of Transjordan until January, 1949.[62b] This conten-

[60] Supplement No. 4.
[61] Second Year, Special Supplement No. 3, pp. 4–7.
[62] *L.c.*, pp. 7–8.
[62a] *SCOR*, No. 5, p. 139.
[62b] Dept. of State, *Wireless Bulletin*, No. 25, January 31, 1949.

tion that membership and recognition are totally unconnected may be true, but it ignores the fact that Mexico, Costa Rica and San Domingo were not invited to join the League of Nations because certain leading powers had not recognised their governments, and it was considered that an invitation to join the League would mean recognition.[63] When the application again came up for consideration, Mongolia was no longer able to secure the support of China, because Mongol troops had invaded Chinese territory in the Peitashan area.

In connection with both these applications, the Soviet delegate made numerous references to the large contribution made by the two States to the common war effort. This led Sir Alexander Cadogan to point out that he was far more interested in Albania's present misdeeds than in her former deeds of valour.[64] The Australian delegate did not challenge Mongolia's war effort, but inquired how a country with a nomadic population of less than a million was able to organise a modern tank brigade.[65] When making his statements Mr. Gromyko referred to the fact that the war in Europe was won solely due to the efforts of the Red Army. Apparently he had forgotten the terms of General Eisenhower's victory order of the day: 'Let us have no part in the profitless quarrels in which other men will inevitably engage as to what country, what service, won the European War'.[66]

Despite the statement in the Potsdam Declaration[67] Mr. Gromyko has found occasion to veto the applications of two neutral States. In the case of both Eire[68] and Portugal[69] he maintained that their friendship towards the Axis during the war and their refusal to maintain diplomatic relations with the Soviet Union—the country which had done most to destroy the menace of Fascism[70]—prevented their admission. It made no difference that Portugal had assisted the war effort of the United Nations, or that those who were most directly affected by Eire's neutrality supported her application, or that the Soviet Union

63 *The Drafting of the Covenant* by D. H. Miller, Vol. 1, 1928, p. 467.
64 S/PV. 186.
65 Second Year, Supplement No. 3.
66 *Crusade in Europe* by Dwight E. Eisenhower, 1949, p. 467.
67 See text to note 39 above.
68 *L.c.*, note 58 above.
69 *Ibid.*
70 *Journal of the United Nations*, 1946, Supplement No. 1-A/C.1/39.

had supported Albania and Mongolia on the basis of their efforts on behalf of the Red Army. Mr. Gromyko was adamant and the veto was invoked.

How far an applicant's war record should be considered is an arguable matter, but it is submitted that any member of the United Nations is justified in arguing that the absence of diplomatic relations is sufficient under Article 4 to bar admission. It may be contended that such a situation does not show an intention 'to practice tolerance and live together . . . as good neighbours',[71] nor does it tend 'to develop friendly relations among nations based on respect for the principle of equal rights and self-determination', which is one of the declared Purposes of the United Nations.[72]

Although the Soviet Union has always maintained that it stands for the development of all colonial and non-self-governing peoples,[73] her delegate found it possible to veto the application of two newly-created States.

Ceylon[74] and Transjordan[75] are still outside the United Nations due to Soviet intransigence. To Ceylon the objection was that there was not sufficient evidence to show that this country was an independent State, particularly as invitations to attend the independence celebrations were issued by the British 'Governor'. This opposition remained even though Australia pointed out that other Dominions issued such invitations through a Governor-General, who might be British. Mr. Gromyko also refused to approach the Singhalese representative sent by Ceylon to provide any information that might be required. The application of Ceylon was again examined after the General Assembly, in December, 1948, asked the Security Council to reconsider all outstanding applications. The President of the Assembly requested the Council to give a decision on Ceylon's application at the earliest possible moment. Once again the Soviet Union exercised its veto, this time alleging that under the General Assembly's resolution all applications had to be considered together.[76]

[71] Charter, Preamble.
[72] Article 1 (2).
[73] *Marxism and the National and Colonial Question* by J. Stalin, 1940.
[74] *SCOR*, Third Year, No. 105; *The Times*, December 3, 1948.
[75] *L.c.*, note 60.
[76] *The Times*, December 16, 1948.

In the case of Transjordan the Soviet Union relied on the customary plea of no diplomatic relations, and also alleged that the country was not sufficiently independent, although Mrs. Pandit pointed out that at the time she became a member India was less independent than Transjordan.[77] In this case, however, there was the additional argument that the Mandate of Great Britain over Transjordan had been illegally and unilaterally denounced by the mandatory. The technical grounds for this argument lay in the fact that the Mandate for Palestine provided[78] that the Mandate could only be modified with the consent of the Council of the League of Nations, whereas the resoluuion of the League confirming the independence of Transjordan was arrived at by the Assembly of the League.[79] What Mr. Gromyko failed to recall was that the Soviet delegate concurred in the resolution in which the General Assembly of the United Nations welcomed the declaration made by the State 'administering . . . Transjordan to establish its independence'.[80]

Despite the reasons given by Mr. Gromyko for opposing Transjordan's application, the Soviet Union did not oppose the admission of Israel. This application was only opposed by Syria, but five members of the Security Council abstained from voting. As a result the application failed to secure the seven votes necessary in the Security Council. Those who abstained did so not on the ground that Israel was not peace-loving but because they considered the application to be premature so long as Israel's boundaries remained undefined.[81] This ignored the fact that Albania had been admitted to membership in the League of Nations even though her frontiers had not yet been delimited.[82]

Israel's application again came up for consideration in March, 1949.[82a] By this time all the members of the Security Council

[77] *United Nations Journal,* 1946, No. 28, Supplement No. 1-A/C.1/41.
[78] League of Nations Document C.529.M.314, 1922, VI, Article 27.
[79] *Provisional Record of the Twenty-First Ordinary Session of the Assembly,* Seventh Meeting, April 18, 1946, Document A/VR/7/46; see also AI/P.V.2/1946 and AI/P.V.3/1946.
[80] Doc. A/64, 1946, Chapter XI, Resolution 1.
[81] *The Times,* December 17, 1948; Docs. S/1093, S/1110, S/PV. 383–386.
[82] *Records of the First Assembly,* 1920, *Plenary Meetings,* p. 651. See also the Advisory Opinion of the Permanent Court of International Justice in the case of *The Monastery of St. Naoum,* 1924, Series B, No. 9.
[82a] Docs. S/1267, S/PV. 413–414.

with the exception of Egypt, which, not being a permanent member, could not veto the application, had recognised Israel, as had more than two-thirds of the members of the General Assembly. The recognition of Israel by these States did not alter the fact that Israel's boundaries remained undefined. Nevertheless, the Security Council approved the application by nine votes to one, with one abstention. Egypt, which had recently signed an armistice with Israel, was the only member of the Security Council to cast a negative vote. Her delegate was critical of the Israeli attitude to the Arab refugee problem, and maintained that Israel had 'a long, continued and persistent record of disobedience' of the Council. The United Kingdom delegate was also dissatisfied with Israel's attitude to the refugees and, therefore, abstained. He pointed out, however, that an improvement in this matter might result in British support of the application in the General Assembly. In accordance with the practice of the Security Council, this abstention by a permanent member was not construed as a veto, although the delegates of both the Argentine and Egypt expressed doubts at the Security Council's right to modify the Charter in this way.[82b]

The applications that still remain to be discussed are those of Austria,[83] the ex-enemy States, Italy,[84] Hungary,[85] Bulgaria,[86] Rumania[87] and Finland,[88] and the two Koreas, North[88a] and South.[88b]

Austria's application was vetoed by the Soviet Union on the ground that the time was not yet ripe, for Austria was an occupied country and discussions were still going on in connection with the treaty re-establishing Austrian independence and sovereignty. Great Britain was of a similar mind, but was prepared to recommend Austria's admission to the General

[82b] Doc. S/PV. 414. In his 'The Use of the Veto', 2 *International Organisation* 1948, p. 227, at p. 245, N. J. Padelford refers to twenty-six occasions on which a motion was approved despite the abstention of a permanent member.

[83] *SCOR*, First Year, Second Series, No. 56; Second Year, Special Supplement No. 3; S/PV. 186, 187.

[84] Special Supplement No. 3; S/PV. 186, 187, 204, 205, 206; *SCOR*, Third Year, No. 55.

[85] *Ibid.*

[86] *Ibid.*

[87] *Ibid.*

[88] S/PV. 204, 205, 206.

[88a] Docs. S/1247, Press Release, SC/880.

[88b] Docs. S/1238, Press Release, SC/889, S/PV. 423.

Assembly for that body to make effective when it considered the time ripe. The Soviet Union considered that this would mean the Security Council abrogating its superior function to the General Assembly and therefore voted negatively. In view of the fact that membership involves certain obligations and might involve Austria entering into international agreements, it may be argued that Austria does not possess sufficient international personality to enable her to become a member of the United Nations. According to the Agreement of 1946 concerning the Machinery of Control in Austria,[89] 'all . . . international agreements which the Austrian Government wishes to make except agreements with one of the Four Powers, shall, before they take effect . . . be submitted by the Austrian Government to the Allied Council', which possesses thirty-one days in which to object. In its Advisory Opinion concerning *Danzig and the International Labour Organisation,* 1930, the Permanent Court of International Justice was faced with a similar situation. In that case the Court pointed out that certain steps which a member of the Organisation would have to take 'would fall within the sphere of foreign relations. Such acts as the ratification of a draft convention or the filing of a complaint against another member State for failure to observe the provisions of a convention must clearly belong to the field of foreign relations. The Free City, as a Member of the Organisation, could not take any such steps itself. It would be obliged to use the Polish Government as its intermediary, and therefore in all such cases Polish consent would be necessary, because the Polish Government would be entitled to refuse to take these steps on behalf of the Free City if they were prejudicial to important interests of the Polish State. . . . The Free City of Danzig could not participate in the work of the Labour Organisation until some arrangement had been made ensuring in advance that no objection could be made by the Polish Government to any action which the Free City might desire to take as a Member of that Organisation'.[90] It must be borne in mind, however, that Austria was admitted to the International Labour Organisation in 1947.[91]

[89] Cmd. 6958 (1946), p. 23, Article 6.
[90] Series B, No. 18, pp. 15–16.
[91] *ILO News,* September, 1947.

In view of the close connection between the fate of the ex-enemy applicants and the Advisory Opinion of the International Court of Justice on *Membership in the United Nations,* it is convenient to consider the applications of the two Koreas before those of the former German satellites.

Korea perhaps represents the greatest cleavage between East and West in connection with the admission of States to membership in the United Nations.

On December 1, 1943, a Communiqué concerning Japan was issued from Cairo by President Roosevelt, Mr. Churchill and Generalissimo Chiang Kai Shek. In this the Three Powers expressed their determination 'that in due course Korea shall become free and independent'.[91a] At Potsdam in 1945 Marshal Stalin joined his three allies in informing the Japanese that the Cairo Declaration would be carried out.[91b] This pledge to Korea was reaffirmed at the Moscow Conference in December, 1945, at which it was declared that, 'with a view to the re-establishment of Korea as an independent State . . . there shall be set up a Provisional Korean Democratic Government'.[91c] Prior to this, however, Korea had, at the end of the Japanese war, been occupied by Russian and American forces, the line of demarcation being represented by latitude 38° N. Differences between the two occupying powers were so grave that each formed a government in its own sector of Korea, with the result that to all intents and purposes two distinct States were created, a Soviet State in the north, and another under American protection in the south.[91d]

At its Second Session the General Assembly of the United Nations established a Temporary Commission on Korea to supervise the elections in Korea 'with right to travel, observe and consult throughout Korea'.[91e] The Soviet Union maintained that the United Nations could not deal with matters connected with the peace settlements, and so regarded the Commission as illegal. In view of the Soviet refusal to co-operate with it, the Commission supervised elections in South Korea only, and at its

[91a] *United Nations Documents,* 1941–1945, R.I.I.A., 1946, p. 25.
[91b] *Ibid.,* p. 206.
[91c] *Ibid.,* pp. 262–263.
[91d] See G. W. Keeton, *China, The Far East and The Future,* 1949, pp. 274–275, 303–307.
[91e] *Resolutions of the Second Regular Session of the United Nations General Assembly,* 1948, pp. 11–13.

Third Session the General Assembly adopted a Resolution recognising the validity of the elections, and declaring that the Government of South Korea, which described itself as the Republic of Korea, was a lawful government based on free elections.[91f]

Shortly after the General Assembly adopted this Resolution, the Secretary-General of the United Nations received applications for admission to membership from both North and South Korea. The application from South Korea was referred by the Security Council to its Committee on Admission of New Members. This was not the case with the application from North Korea, however. By a majority of eight to two, with the Argentine abstaining and the Ukraine and the Soviet Union in opposition, the Security Council refused to refer this application to its Committee. This debate was marked by mutual recriminations. The minority argued that the attitude of the majority was illegal as being contrary to the Rules of Procedure of the Security Council. The majority, on the other hand, maintained that the Government of North Korea represented nobody, and that the only Government in Korea was that recognised by the Resolution of the General Assembly.

After this fate had befallen the application of the Soviet Government of North Korea it was only to be expected that the application from the South would be vetoed by the Soviet Union. In the Committee on Admission the application from South Korea received eight votes, being opposed by the Soviet Union and the Ukraine. The representative of Cuba was absent when the vote was taken, but had previously expressed support for the application. When the issue was returned to the Security Council, the Government of South Korea was condemned by the Soviet representative as a 'puppet' and, as such, ineligible for admission to the United Nations. He alleged, further, that the application for admission had only been made because it was known the Soviet Union would veto it, and thus provide further 'propaganda' for the United States and its supporters in the debate on limiting the veto at the Second Part of the Third Session of the General Assembly. When the matter was eventually put to the vote, the pre-ordained result was obtained —nine in favour, two, the Soviet Union and the Ukraine, against.

[91f] Doc. PGA/100, p. 24.

Of the ex-enemy States only Italy and Finland received the support of all the permanent members of the Security Council. The Western powers protested that the others had disregarded their obligations concerning human rights and democratic freedoms under the Peace Treaties,[92] while Bulgaria was condemned for aiding the Greek rebels. On these grounds the West alleged that these three States were not able and willing to carry out their obligations under the Charter. The Soviet Union, on the other hand, believed that all were qualified. Arguing on the basis of the Potsdam Declaration, she contended that since they were all ex-enemy States the entry of one meant the entry of all, and therefore if all were not admitted none would be. Sir Alexander Cadogan said of this attitude that it 'sounds like something rather commonly and vulgarly known as horse-trade', while Australia condemned it as akin to blackmail.[93] Nobody talked of horse-trading or blackmail when, on another occasion, the representative of the Argentine 'thanked the Soviet *bloc* for their co-operation in the matter of Argentina's election to the Security Council. He did not think that there was much doubt that Argentina had received their six votes and that the Ukrainian Soviet Socialist Republic had in return received eighteen votes'.[94]

THE ADVISORY OPINION ON MEMBERSHIP

The deadlock in the Security Council[95] led the General Assembly to ask the International Court of Justice for an Advisory Opinion as to whether any member of the United Nations could make its consent to the admission of an applicant to membership dependent on conditions not stipulated in Article 4, paragraph 1, and whether, if a member recognised these conditions to be fulfilled by an applicant, it could make its consent dependent on the admission of others.[96]

[92] Cmd. 7022 (1947), Bulgaria, Article 3; Hungary, Article 2; Rumania, Article 3; and see 'Human Rights in the Paris Peace Treaties' by A. Martin, 24 *B.Y.I.L.* 1947.

[93] S/PV. 204.

[94] General Assembly, First Committee, 100th Meeting, Doc. A/C.1/SR. 100.

[95] A full account of the practice of the Security Council in connection with applications for membership in the United Nations is to be found in *Die Mitgliedschaft in den Vereinten Nationen* by F. Klein, 1 *Archiv des Völkerrechts* 1948, p. 147 *et seq.*; see also 'Admission to the United Nations' by P. O. Humber, 24 *B.Y.I.L.* 1947.

[96] *L.c.*, note 48 above.

The International Court was divided in its Opinion[97] and, by a majority of nine to six, answered both questions in the negative. The majority were of opinion that the request did not refer to the actual vote cast nor to a member's freedom of expressing its opinion, but only to the 'statements made by a Member concerning the vote it intends to give'.[98] In other words, the Court was requested to say whether the conditions laid down in the Article were exclusive, rendering illegal any other consideration introduced by a Member. In a joint Dissenting Opinion, four of the minority pointed out that it was impossible to separate statements made by Members from the vote they exercise, for it is the vote which expresses the intention of the Members, and is the medium through which consent is given. 'It would be a strange interpretation which gave a Member freedom to base its vote upon a certain consideration and at the same time forbade it to invoke that consideration in the discussion preceding the vote'.[99]

The majority considered that the conditions contained in the Charter were exhaustive in character, for paragraph 2 of Article 4 provides for the admission of 'any *such* State' which fulfils the conditions of paragraph 1, and any other interpretation would give the Members a practically unlimited power of discretion in the imposition of new conditions. They considered that while it cannot 'be argued that the conditions enumerated represent only an indispensable minimum, in the sense that political considerations could be superimposed upon them, and prevent the admission of an applicant which fulfils them, . . . it does not follow from the exhaustive character of paragraph 1 of Article 4 that an appreciation is precluded of such circumstances of fact as would enable the existence of the requisite conditions to be verified. Article 4 does not forbid the taking into account of any factor which it is possible reasonably and in good faith to connect with the conditions laid down in that Article. The taking into account of such factors is implied in the very wide and very elastic nature of the prescribed conditions; no relevant political factor—that is to say, none connected with the conditions of membership—is excluded'.[100]

[97] *L.c.*, note 35 above.
[98] *Ibid.*, p. 60.
[99] *Ibid.*, pp. 82–93 at p. 82.
[100] *Ibid.*, pp. 62–63.

In the light of this latter statement, and as no Member will ever agree it is exercising its vote other than in good faith, it is submitted that this opinion of the majority is wide enough to permit a Member to make its consent dependent on whatsoever condition it pleases. If it is not so wide, it merely means that a Member wishing to oppose an application for grounds not mentioned in the Article should do so without giving any reason for its action.

Two of the judges who concurred in the majority opinion found it necessary to issue separate opinions of their own. Judge Azevedo's opinion[101] is so complex and involved that it is impossible to ascertain why he concurred rather than dissented. Since he believed that a State fulfilling the conditions has no right to admission, but only an interest which becomes a right by virtue of the vote,[102] it may be felt that he concurred with the dissidents.

Judge Alvarez[103] considered that every State fulfilling the conditions has 'a *right* to membership'.[104] He went on to point out, however, that 'cases may arise in which the admission of a State is liable to disturb the international situation, or at all events the organisation, for instance, if such admission would give a very great influence to certain groups of States, or produce profound divergencies between them. Consequently, even if the conditions of admission are fulfilled by an applicant, admission may be refused. In such cases the question is no longer a legal one; it becomes a political one and must be regarded as such. In a concrete case of this kind the Court must declare that it has no jurisdiction'.[105] In view of this, it is submitted that Judge Alvarez should have concurred in the dissenting opinion, particularly as he was of opinion that 'if there are several simultaneous applications for admission, each must be considered separately, save in exceptional circumstances'.[106] One of these 'exceptional circumstances' may surely be the fact that all the applicants are ex-enemy States.

If this interpretation of the separate opinions of Judges

101 *Ibid.*, pp. 73–78.
102 *Ibid.*, p. 77.
103 *Ibid.*, pp. 67–72.
104 *Ibid.*, p. 71.
105 *Ibid.*
106 *Ibid.*, p. 72.

Azevedo and Alvarez is accepted, it would transfer the minority into a majority.

Although four of the dissenting judges issued a joint opinion, Judges Zoričic[107] and Krylov[108] accepted their opinion in principle, so that we may consider it to be the opinion of all six. The importance of the two separate opinions lies in the fact that both judges upheld the authority of the Court to interpret the Charter, despite the fact that the representatives of their countries, Yugoslavia and the Soviet Union, have consistently maintained that the Court had no such power. Their action illustrates the independence from State interference of international judges. Similarly, despite Sir Alexander Cadogan's criticism of Soviet horse-trading, Sir Arnold McNair was among the minority.

As we have already seen,[109] the dissenting judges believed that new members could not become Members of the United Nations by accession, but had to be admitted by decision of the Organisation, the Members of which possess complete discretion in this matter. They pointed out that the Permanent Court of International Justice had consistently maintained that restrictions upon the freedom of action of sovereign States could not be presumed, and if any were intended they must be expressly specified.[110] In the absence of any express statement in the Charter they were not prepared to imply any restriction. They believed that the conditions of Article 4 constituted a minimum and that no State could be admitted that did not satisfy them, but 'the resolutions in regard to admission are decisions of a political character; they emanate from political organs; by general consent they involve the consideration of political factors, with a view to deciding whether the applicant State possesses the qualifications prescribed by paragraph 1 of Article 4; they produce a political effect by changing the condition of the applicant State in making it a Member of the United Nations. . . . The admission of a new Member is pre-eminently a political act, and a political act of the greatest importance. The main function of a political organ is to examine questions in their political aspect, which means examin-

[107] *Ibid.*, pp. 94–106.
[108] *Ibid.*, pp. 107–115.
[109] Text to note 35 above.
[110] *The Lotus*, 1927, Series A, No. 10, pp. 18–19.

ing them from every point of view. It follows that the Members of such an organ which are responsible for forming its decisions must consider questions from every aspect, and, in consequence, are legally entitled to base their arguments and their votes upon political considerations'.[111]

Having thus decided that a Member of the Security Council or General Assembly is legally entitled to have regard to political considerations over and above the conditions stipulated in the Charter, the minority refused to give any opinion on the second question, for this would have involved an estimation of the character of the political considerations involved, which they believed to be beyond the power of the Court.[112]

The conflict concerning the admission of new members is merely an example of the general conflict between East and West and all arguments concerning it are relevant to every exercise of the veto. In this connection it is desirable to bear in mind a statement made by the representative of India during a debate on the reform of the veto: 'The unanimity rule, though not very democratic, faithfully reflected the existing international situation. Similarly, the use which had been made of this rule . . . faithfully reflected the prevailing tension in the international sphere'.[113]

[111] *Ibid.*, p. 85.
[112] *Ibid.*, p. 93. The opinion of the Court is discussed by G. Schwarzenberger in *International Law*, Vol. 1, 1949, pp. 532–533.
[113] *United Nations Journal*, No. 36, Supplement A-A/C.1/60.

BIBL. LONDON UNIV.

TABLE OF CASES

Adams *v.* Baldwin 184
Agar Ellis, Re 129
Allen *v.* Flood 6
Andrews *v.* D.P.P. 36, 37
Armory *v.* Delamirie 71, 72
Ashby *v.* White 7
Att. Gen. *v.* National Provincial Bank 99–100

Bailey *v.* Williamson 189
Balfour *v.* Balfour 135
Beard *v.* D.P.P. 35
Bonar Law Memorial Trusts *v.* Inland Revenue Commissioners 99
Bottomley *v.* Bannister 167
Bourne *v.* Keane 97
Bowman *v.* The Secular Society Ltd. 90, 137
Bradlaugh *v.* Clarke 7
Brend *v.* Wood 49
Bridges *v.* Hawkesworth ... 70–74, 77, 78, 84
Brighton Corporation *v.* Packham 193
Burden *v.* Rigler 192
Button 'B' Pennies Case ...68, 70, 78, 81–82

Carroll, Re 129
Caus, Re 98
Chichester Diocesan Fund and Board of Finance *v.* Simpson 87
Coats Trusts, Re 92
Commissioners of Income Tax *v.* Pemsel 89
Cundy *v.* Le Cocq 50

De Morgan *v.* Metropolitan Board of Works 193
De Reneville *v.* De Reneville 59
Diplock, Re 86–89, 102, 168
Dominion Students' Hall Trust, Re 221
Donoghue *v.* Stevenson 167
Duncan *v.* Jones 198
Dupree's Trusts, Re 94, 101

Elwes *v.* Brigg Gas Co. ... 70, 72, 77, 84
Ensign Maxwell's Case 39

Field *v.* Receiver of Metropolitan Police 198
Fish *v.* Kapur 168
Foveaux, Re 91

Grant *v.* Australian Knitting Mills 167
Gunter *v.* Metropolitan Police District Receiver 200

Hales *v.* Petit 124
Hamps *v.* Darby 72, 76
Hampstead Garden Suburb Trust Ltd. *v.* Denbow 193
Hannah *v.* Peel 71–74, 78, 84
Hibbert *v.* McKiernan 68, 76–78, 82–85, 166
Holmes *v.* D.P.P. 39
Homer *v.* Cadnam 192
Hopkinson, Re 99
Hummeltenberg, Re 91

Idu Beg's Case 37

Keren Kayemeth Le Jisrael Ltd. *v.* Inland Revenue Commissioners 92

Lopes, Re 94
Lotus, The 281

Maguire *v.* A.G. 92
Mahmoud and Ispahani, In Re 50
Mancini *v.* D.P.P. 40
McCrae *v.* Downey 49
McNamee *v.* Mansfield 92
Merry *v.* Green 76
Moggridge *v.* Thackwell 97
Munday *v.* Metropolitan Police District Receiver 201

National Anti-Vivisection Society *v.* Inland Revenue Commissioners 90–92, 99
Nidamarti's Case 37

O'Connell *v.* The Queen 4, 7
Otto *v.* Bolton 167

Parker *v.* Adler 50
Partridge *v.* Strange 125

Read *v.* Lyons 164
Redford *v.* Birley 194
R. *v.* Aden 81

R. *v.* Ashman 34
R. *v.* Betts and Ridley 35
R. *v.* Bishop 50
R. *v.* Carswell 58
R. *v.* Charnley and Others... 186
R. *v.* Child 199
R. *v.* Conatty 60, 61
R. *v.* Cunliffe 60, 61
R. *v.* De Banks 81
R. *v.* Denyer 58
R. *v.* Doherty 24
R. *v.* Dolman 63, 64
R. *v.* Dudley and Stephens .. 40
R. *v.* Fursey 199
R. *v.* George Dewhurst and Others 187
R. *v.* Graham 198
R. *v.* Harding 77
R. *v.* Hassall 81
R. *v.* Hibbert 50
R. *v.* Hudson 76
R. *v.* Hunt 184
R. *v.* Hussey 69
R. *v.* Irvine 186
R. *v.* Jarmain 35
R. *v.* Johnston 66
R. *v.* Kircaldy 61–62
R. *v.* Larkin 36
R. *v.* Maugham 50
R. *v.* Mucklow 76
R. *v.* Pinney 199, 200
R. *v.* Prince ... 47, 50, 52, 54, 56
R. *v.* Rowe 77, 78
R. *v.* Sellars 60
R. *v.* Semini 40
R. *v.* Serné 35
R. *v.* Stone 35
R. *v.* Taylor, Ward and Hawthorne 186
R. *v.* Thompson 60–64
R. *v.* Tolson ... 49, 51–56, 58, 61, 62, 64, 67
R. *v.* Weiow 62–64
R. *v.* Wheat and Stocks ... 51–53 57–66
R. *v.* Wood 185, 186
R. *v.* Woolcock 199
R. *v.* Wright 186
Rose *v.* Ford 112
Rylands *v.* Fletcher 5, 231

Sanders *v.* Maclean 132
Scowcroft, Re 99
Semayne's Case 134
South Staffordshire Waterworks Co. *v.* Sharman 72, 73, 77, 84
Spackman *v.* Foster 70

Tetley, Re 93
Thomas *v.* The King 55, 58
Thomas *v.* Sawkins 198
Thornton *v.* Howe 98
Travers *v.* Gloucester Corporation 167

Wensleydale Peerage Case 5
Williams' Trustees *v.* Inland Revenue Commissioners 92
Woolmington *v.* D.P.P. 36

TABLE OF STATUTES

1275, Statute de Bigamis (4 Edw. 1) 48
1539 (31 Hen. 8, c. 8) 135
1553, Evidence of the Accused Act (1 & 2 Phil. & Mar., c. 13) 18
1555, Evidence of the Accused Act (2 & 3 Phil. & Mar., c. 10) 18
1601, Statute of Charitable Uses (43 Eliz., c. 4) 93–97
1603 (1 Jac. 1, c. 11) 48, 49
1714, Riot Act (1 Geo. 1, stat. 2, c. 5) 198, 199
1817, Seditious Meetings Act (57 Geo. 3, c. 19) 188
1819, Unlawful Drilling Act (60 Geo. 3 & 1 Geo. 4, c. 1) 184, 193, 194
1828 (9 Geo. 4, c. 31) 48
1829 (10 Geo. 4, c. 34) 48
1832, Reform Act (2 & 3 Will. 4, c. 45) 174
1835, Highways Act (5 & 6 Will. 4, c. 50) 192
1839, Metropolitan Police Act (2 & 3 Vict., c. 47) 183, 194
1843, Evidence Act (6 & 7 Vict., c. 85) 18
1844, Trafalgar Square Act (7 & 8 Vict., c. 60) 190
1847, Town Police Clauses Act (10 & 11 Vict., c. 89) 192
1848, Indictable Offences Act (11 & 12 Vict., c. 42) 24
1851, Crown Lands Act (14 & 15 Vict., c. 42) 190
1851, Evidence Act (14 & 15 Vict., c. 99) 18
1853, London Hackney Carriage Act (16 & 17 Vict., c. 33) 80
1861, Malicious Damage Act (24 & 25 Vict., c. 97) 69, 200
1861, Offence against the Person Act (24 & 25 Vict., c. 100) 48–59
1863, Statute Law Revision Act (26 & 27 Vict., c. 125) 48
1866, Parliamentary Oaths Act (29 & 30 Vict., c. 19) 7
1866, Metropolitan Commons Act (29 & 30 Vict., c. 122) 193
1867, British North America Act (30 & 31 Vict., c. 3) 206, 209
1867, Metropolitan Streets Act (30 & 31 Vict., c. 134) 183
1869, Metropolitan Public Carriage Act (32 & 33 Vict., c. 115) 80
1871, Prevention of Crimes Act (34 & 35 Vict., c. 112) 198
1872, Parks Regulation Act (35 & 36 Vict., c. 15) 189
1873, Judicature Act (36 & 37 Vict., c. 66) 6
1875, Judicature Act (38 & 39 Vict., c. 77) 6
1876, Appellate Jurisdiction Act (39 & 40 Vict., c. 59) 6, 10
1883, Corrupt and Illegal Practices (Prevention) Act (46 & 47 Vict., c. 51) 195
1885, Prevention of Crimes Amendment Act (48 & 49 Vict., c. 75) ... 198
1886, Riot (Damages) Act (49 & 50 Vict., c. 38) 200, 201
1890, London County Council (General Powers) Act (53 & 54 Vict., c. ccxliii) 191
1893, Public Authorities Protection Act (56 & 57 Vict., c. 61) 178
1898, Criminal Evidence Act (61 & 62 Vict., c. 36) 19, 20, 21, 25
1898, Metropolitan Commons Act (61 & 62 Vict., c. 43) 193
1898, London County Council (General Powers) Act (61 & 62 Vict., c. ccxxi) 191
1907, Probation of Offenders Act (7 Edw. 7, c. 17) 187
1907, Deceased Wife's Sister's Marriage Act (7 Edw. 7, c. 47) 60
1908, Public Meeting Act (8 Edw. 7, c. 66) 195, 197
1915, British North America Act (5 & 6 Geo. 5, c. 45) 206, 209
1915, Indictments Act (5 & 6 Geo. 5, c. 90) 84
1916, Larceny Act (6 & 7 Geo. 5, c. 50) 68–70, 73, 74, 79, 80
1920, Firearms Act (10 & 11 Geo. 5, c. 43) 184, 193
1921, Deceased Brother's Widow's Marriage Act (11 & 12 Geo. 5, c. 24) 60

1926, Parks Regulation (Amendment) Act (16 & 17, Geo. 5, c. 36) 189, 191
1929, Age of Marriage Act (19 & 20 Geo. 5, c. 36) 60
1930, British North America Act (20 & 21 Geo. 5, c. 26) 206
1931, Statute of Westminster (22 Geo. 5, c. 4) ... 206, 207, 208, 211–212
1931, Marriage (Prohibited Degrees of Relationship) Act (21 & 22 Geo. 5, c. 31) 60
1933, Newfoundland Act (24 Geo. 5, c. 2) 207, 208, 210
1935, London County Council (General Powers) Act (25 & 26 Geo. 5, c. xxxiii) 191
1936, Public Order Act (1 Edw. 8 & 1 Geo. 6, c. 6) 185, 187, 188, 194–197
1937, Firearms Act (1 Edw. 8 & 1 Geo. 6, c. 12) 200
1939, Limitation Act (2 & 3 Geo. 6, c. 21) 178
1943, War Damage Act (6 & 7 Geo. 6, c. 21) 100
1946, Civil Aviation Act (9 & 10 Geo. 6, c. 70) 80
1947, India Independence Act (10 & 11 Geo. 6, c. 30) 204
1947, Transport Act (10 & 11 Geo. 6, c. 49) 80
1947, Ceylon Independence Act (11 Geo. 6, c. 7) 204
1948, British Nationality Act (11 & 12 Geo. 6, c. 56) 218, 219, 225
1948, Criminal Justice Act (11 & 12 Geo. 6, c. 58) 12

INDEX

Accused, evidence of, 17–22
Administrative law, Germany, 254–255
Appeals, final, place of hearing, 9–12
Appellate Committee, House of Lords, 9–12
Ayliffe, John, 142, 150

Bever, Thomas, 142, 144, 152
Bigamy, 47–67
British subjects, 217–221

Capital punishment, 27–31
Charitable purposes, historical and social setting, 89–99
Charities, 86–102
Civilians, English, 139–154
Codification, 155–171, 227–242
Commercial law, Western Union, 236–237
Common law, philosophy of, 116–138
Commonwealth tribunal, proposal for, 205–207
Community and Society, distinction between, 103–106
Community law, functions, 107–109
Confessions, criminal matters, 22–24
Contempt of court, Germany, 253–254
Co-ordination, law of, 107–109
Corporations, public, 172–182
Court of appeal, Western Union, 241–244
Criminal law,
  Bigamy, 47–67
  Germany, 254
  Larceny, 68–85
  Procedure and practice, 13–26
  Public meetings, 183–201
  Riot, 198–199
  Western Union, 239
Crown as Commonwealth symbol, 211–225

Death penalty, 27–31
Defamation, Committee's Report, 170, 171
Dominion status, 202–225

Eden, Robert, 151
Evidence, criminal matters, 13–26

Finding, 68–85

German Municipal Code, 251–253
Germany, law in the British Zone, 245–257

Hallifax, Samuel, 150
Harris, George, 151, 152
House of Lords, 1–12

Indian Penal Code, 31–46
International law, 258–282
International law, legal character, 114, 115
Ireland, 211–216, 219, 221, 222, 225

Jurisprudence, 103–138

Larceny, finding, 68–85
Law, definition of, 111, 112
Law, essence of, 103–115
Law, functions of, 103–115
Law of nature, 112, 113, 117–138
Law Reporting Committee, 169, 170
Lords, House of, 1–12

Meetings, public, 183–201
Mens rea, 47–50
Mens rea and bigamy, 47–67
Ministerial responsibility, 177–182
Mistake, 64–67
Murder, law of, reform, 27–46

Nationality, 217–221
Nature, law of, 112, 113, 117–138
Newfoundland Constitution, 207–211

Pardon, power of, 43–46
Parliamentary questions, 179–181
Possession, 75–78
Power, law of, 106–107
Private international law, 237–239
Procedure and practice, criminal matters, 13–26
Public corporations, 172–182
Public corporations, Crown servant, 177
Public meeting, 183–201

Reason, law of, 117–138
Reciprocity, law of, 109–111
Reprieve, 43–46

Reputation, evidence of, 15–17
Riot, 198–201
Roman law, 139–154

Society and community, distinction between, 103–106
Society law, functions of, 106–107
South Africa, 216
Stealing, finding, 68–85
Sudan Penal Code, 38

Taylor, John, 152, 153
Uniforms, 184–187
United Nations, membership in, 258–282
Universality, 258–272

Western Union, private law aspects, 226–244

Zouche, Richard, 141, 143, 146, 149

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